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Supreme Court
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Supreme Court of the United States

PREWITT ENTERPRISES, INC., *et al.*,

Petitioners,

—v.—

ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an agreement between a foreign government and a defendant located within its borders which provides that the defendant cannot be served process without its consent will completely immunize the defendant from service by a U.S. federal court.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Prewitt Enterprises, Inc. was the appellant below. The petitioner represents a putative plaintiff class comprised of all U.S. consumers of refined petroleum products. This class excludes the Organization of the Petroleum Exporting Countries ("OPEC"), counsel for the parties, and members of the judiciary.

The respondent in this Court, appellee below, is OPEC. As this brief explains *infra*, OPEC is an unincorporated association formed in Baghdad, Iraq in 1960 which has the principal aim of coordinating and unifying the petroleum policies of Member Countries.

RULE 29.6 STATEMENT

Petitioner Prewitt Enterprises, Inc. has no parent corporation and no publicly held company owns 10% or more of Prewitt Enterprise's stock.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING BELOW	ii
RULE 29.6 STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	7
I. THE DECISION BELOW CREATES A LOOPHOLE PREVENTING SERVICE OF PROCESS ON FOREIGN WRONGDOERS AND SUBVERTS THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY EMBODIED IN THE FOREIGN SOVEREIGN IMMUNITIES ACT	8
II. THE DECISION BELOW CREATES A CIRCUIT SPLIT	13

PAGE

III. THE DECISION BELOW MISREADS RULE 4(F)(3) 16

CONCLUSION 23

APPENDIX

CIRCUIT COURT OPINION 1a

CIRCUIT COURT ORDER DENYING MOTION FOR REHEARING 22a

ORDER OF DISMISSAL 24a

DISTRICT COURT ORDER DISMISSING COMPLAINT FOR IMPROPER SERVICE OF PROCESS 25a

DISTRICT COURT ORDER DENYING MOTION FOR REHEARING 38a

FED. R. CIV. P. 4(F) 40a

HEADQUARTERS AGREEMENT BETWEEN THE REPUBLIC OF AUSTRIA AND OPEC 42a

NOTE OF THE OPEC SECRETARY GENERAL'S TELEPHONE CONVERSATION WITH THE DIRECTOR OF THE RESEARCH DIVISION REGARDING PREWITT'S COMPLAINT 75a

MEMORANDUM FROM HUDDIE DEWANTO REGARDING THE DISTRICT COURT'S SUMMONS 76a

TABLE OF AUTHORITIES

Cases	PAGE
Administrator, FAA v. Robertson, 422 U.S. 255 (1975)	22
Berizzi Bros. Co. v. Steamship Pesaro, 271 U.S. 562 (1926)	11
Chapman v. United States, 500 U.S. 453 (1991)	20
Clark v. Long, 255 F.3d 555 (8th Cir. 2001)	22
In re Evanston Motor Co., 735 F.2d 1029 (7th Cir. 1984)	22
Forum Fin. Group, LLC v. President & Fellows of Harvard Coll., 199 F.R.D. 22 (D. Maine 2001)	14
H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229 (1989)	22
Hollow v. Hollow, 747 N.Y.S.2d 704 (N.Y. Sup. Ct. 2002)	9
Int'l Controls Corp. v. Vesco, 593 F.2d 166 (2d Cir. 1979)	9
Lehman v. Nakshian, 453 U.S. 156 (1981)	20
Mayoral-Amy v. BHI Corp., 180 F.R.D. 456 (S.D. Fla. 1998)	14
Morgan Guaranty Trust Co. of N.Y. v. Hauser, 584 N.Y.S.2d 65 (N.Y. App. Div. 1992)	9

PAGE

New England Merchants Nat'l Bank v. Iran Power Generation and Transmission Co., 495 F. Supp. 73 (S.D.N.Y. 1980) 9, 10

Prewitt Enters., Inc. v. OPEC, 353 F.3d 916 (11th Cir. 2003) 3, 6, 7, 15, 18, 21

Prewitt Enters., Inc. v. OPEC, No. CV-00-W-0865-S, 2001 WL 624789 (N.D. Ala., Mar. 22, 2001) 4, 5

Reiter v. Sonotone Corp., 442 U.S. 330 (1979).. 19

Republic of Argentina v. Weltover, 504 U.S. 607 (1992)..... 12

Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002) 8, 13, 14, 15, 17, 19, 20

Ryan v. Brunswick Corp., No. 02-CV-0133E(F), 2002 WL 1628933 (W.D.N.Y. May 31, 2002) 14, 20

The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812) 11

Semtek Int'l Inc. v. Merkuriy Ltd., No. 95-11820, 1996 U.S. Dist. LEXIS 22248 (D. Mass. Aug. 13, 1996) 14

Smith v. Islamic Emirate of Afghanistan, Nos. 01 CIV 10132, 01 CIV 10144, 2001 WL 1658211 (S.D.N.Y. Dec. 26, 2001) 9, 20

United States v. Healy, 376 U.S. 75 (1964) 20

PAGE

Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983) 12

Statutes and Treaties

28 U.S.C. § 1254 1

28 U.S.C. § 1602 *et seq.* 12

28 U.S.C. § 1608(b) 13

Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331 18

Rules

Fed. R. Civ. P. 4(f)(2) 2, 5-6, 16-21

Fed. R. Civ. P. 4(f)(3) 1, 2, 6-9, 13-23

Fed. R. Civ. P. 12(b)(5) 5

Fed. R. Civ. P. 60(b) 5

Foreign Laws

Agreement Between the Republic of Austria and the Organization of the Petroleum Exporting Countries Regarding the Headquarters of the Organization of the Petroleum Exporting Countries, Feb. 18, 1974, *BGBL* 1974/382 3

OPEC Stat. (2000) 3

PAGE

Other Authorities

Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments, Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) 11, 12

Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337 (2003)..... 17

David MacKusick, Comment, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741 (1996)..... 12

Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163 (2001) 11

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) 18

DAVID D. SIEGEL, SUPPLEMENTARY PRACTICE COMMENTARY C4-24, 28 U.S.C.A. FED. R. CIV. P. 4 (West Supp. 2000)..... 17

PETITION FOR A WRIT OF CERTIORARI

Petitioner Prewitt Enterprises, Inc. ("Prewitt") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

Petitioners seek to appeal a judgment holding that the Organization of the Petroleum Exporting Countries ("OPEC") cannot lawfully be served with process under the Federal Rules of Civil Procedure. The district court's order dismissing petitioners' complaint for improper service of process (Pet. App. 24a-37a) is unpublished. The district court's order denying petitioners' motion for rehearing and refusing to fashion alternative means of service pursuant to Fed. R. Civ. P. 4(f)(3) (Pet. App. 38a-39a) is also unpublished. The Eleventh Circuit's opinion (per Barkett, J.) holding that OPEC cannot lawfully be served with process under the Federal Rules of Civil Procedure (Pet. App. 1a-21a) is published at 353 F.3d 916. The order of the United States Court of Appeals for the Eleventh Circuit denying rehearing (Pet. App. 22a-23a) is unpublished.

JURISDICTION

The Eleventh Circuit denied petitioner Prewitt's petition for rehearing on March 2, 2004. Prewitt timely filed this petition for certiorari, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254.

RULES INVOLVED

Rule 4(f)(3) of the Federal Rules of Civil Procedure provides in relevant part that service of process may be "effected in a place not within any judicial district of the United States . . . by other means not prohibited by international agreement as may be directed by the court."

Rule 4(f)(2)(A) provides in relevant part that service is lawful in a foreign jurisdiction if it takes place "in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction." Rule 4(f)(2)(C) provides in relevant part that service in a foreign jurisdiction is lawful if accomplished by "any form of mail requiring a signed receipt" that is dispatched by the clerk of the court, unless that form of service is "prohibited by the law of the foreign country." The relevant provisions of the Federal Rules of Civil Procedure are reproduced in the appendix (at 40a-41a).

STATEMENT OF THE CASE

This petition arises from the dismissal of petitioner Prewitt's class action lawsuit against OPEC for violations of the U.S. antitrust laws. Both the district court and circuit court held that Prewitt's complaint should be dismissed because both courts believed that OPEC simply could not be served with process under U.S. law. This petition now challenges the ruling of the court below. The petition argues that the district court has the power to serve OPEC with process under Rule 4(f)(3) of the Federal Rules of Civil Procedure.

1. *The district court opinions.* Prewitt is a corporation organized and existing under the laws of Alabama with its principal place of business in Birmingham, Alabama.

Prewitt purchases substantial quantities of gasoline and other refined petroleum products for resale to the general public at its Eastwood Texaco Service Center gas station.

The Organization for the Petroleum Exporting Countries ("OPEC") is an unincorporated association formed in Baghdad, Iraq in 1960. OPEC's principal aim is "the co-ordination and unification of the petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively." OPEC Stat. art. 2(A) (2000). OPEC has been headquartered in Vienna, Austria since September 1, 1965. Its relationship with the Austrian government is defined by the Agreement Between the Republic of Austria and the Organization of the Petroleum Exporting Countries Regarding the Headquarters of the Organization of the Petroleum Exporting Countries, Feb. 18, 1974, *BGBL* 1974/382 ("Headquarters Agreement") (*see* Pet. App. 42a-74a). Among other things, the Headquarters Agreement governs the circumstances under which OPEC can be served with legal process. On that issue, the Headquarters Agreement states that "the service of legal process . . . shall not take place within the [OPEC] headquarters seat except with the express consent of, and under conditions approved by, the Secretary General." *See Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 923 (11th Cir. 2003).

Prewitt filed a complaint seeking injunctive relief and attorneys' fees in the Northern District of Alabama against OPEC on behalf of itself and as the representative of all persons or entities who have indirectly purchased petroleum products in the United States since March 1999. Prewitt claimed that OPEC has been coordinating an international conspiracy through agreements among its Member States and non-OPEC members to limit the production and export of oil in order to fix

world oil prices above competitive levels. Prewitt argued that these agreements constitute violations of U.S. antitrust laws, specifically the Sherman and Clayton Acts, and have resulted in a substantial and adverse impact on U.S. trade and commerce. Prewitt alleged that it was harmed by these anticompetitive agreements, as its own acquisition and inventory costs for gasoline have increased significantly as a result of OPEC's illegal activity. Consequently, Prewitt requested that the court declare the OPEC-coordinated agreements illegal under U.S. law, enjoin implementation of the agreements, grant any other appropriate equitable relief, and award costs of the suit against OPEC for injuries sustained by Prewitt.

Prewitt initially attempted to serve OPEC by requesting that the district court send a copy of the complaint to OPEC by international registered mail, return receipt requested. The court clerk did so, mailing Prewitt's summons and complaint to OPEC at its headquarters in Vienna. The pleadings were signed for, stamped "received" by OPEC's Administration and Human Resources Department, and forwarded to the Director of OPEC's Research Division and other departments, including the Secretary General's office. OPEC's records reveal that the Secretary General spoke with the Director of OPEC's Research Division, and although they knew that the complaint originated "from a genuine court office," Pet. App. 76a, they decided "that the Secretariat should simply ignore the whole thing." *Id.* at 75a. It is therefore undisputed in this case that OPEC received both timely and actual notice of this action and of the deadline for responding to the Complaint.

Without OPEC's participation, the district court (Weiner, J., sitting by designation) certified a class and entered a default judgment and order of injunction against OPEC. *Prewitt Enters. v. OPEC*, No. CV-00-W-0865-S,

2001 WL 624789 (N.D. Ala., Mar. 22, 2001). The court found that there was a conspiracy between OPEC, its Member States, and certain non-OPEC Members to fix and control crude oil prices; that the agreements coordinated and implemented by OPEC were illegal under U.S. antitrust laws; that OPEC's illegal conduct has resulted in substantial and adverse impact on U.S. trade and commerce of approximately $80 to $120 million per day; and that OPEC and those acting in concert with OPEC should be enjoined from entering into, implementing, and enforcing any further oil price-fixing agreements for a period of twelve months. The court's orders were served on OPEC and copies thereof were also delivered to each of the U.S. embassies for OPEC's Member States.

In response, OPEC entered a special appearance and filed a motion to set aside the default judgment and stay its enforcement pursuant to Fed. R. Civ. P. 60(b)(1), (4), (5) and (6). Without allowing for opposition papers, a newly-assigned district judge (Clemon, J.) granted this motion, vacating the default judgment and injunction. OPEC then filed a motion to dismiss Prewitt's complaint on various grounds, including insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5). The district court bifurcated OPEC's motion and limited any discovery and briefing to the service of process issue.

After oral argument, the district court dismissed the case, finding that Prewitt's attempt at serving OPEC with process by international registered mail pursuant to Fed. R. Civ. P. 4(f)(2) had been ineffective. However, the court's opinion stated that the dismissal was "without prejudice to the right of [Prewitt] to pursue an alternative means of effecting service on [OPEC]." Pet. App. 36a. Accepting the court's invitation to pursue an alternative means of service, Prewitt filed a motion for recon-

sideration which requested the court to authorize alternative means of service pursuant to Fed. R. Civ. P. 4(f)(3). Unlike Rule 4(f)(2), Fed. R. Civ. P. 4(f)(3) does not require service of process attempted under that provision to comport with the law of the foreign state in which the defendant was located. Rather, Rule 4(f)(3) authorizes methods of service that are not authorized by either Fed. R. Civ. P. 4(f)(1) or 4(f)(2) so long as those means are "not prohibited by international agreement." Prewitt further argued that since OPEC had received actual notice of the lawsuit against it by the attempted service under Rule 4(f)(2), that service should be deemed effective *nunc pro tunc* under Rule 4(f)(3).

The district court denied the motion for reconsideration with a one-sentence Order which stated simply that OPEC "cannot in this case be effectively served with process." Pet. App. 38a.

2. *The circuit court's opinion.* Thereafter, Prewitt appealed to the Eleventh Circuit Court of Appeals, which upheld the district court in all respects. The circuit court considered whether extraterritorial service on OPEC could be accomplished through Fed. R. Civ. P. 4(f)(3). The circuit court held that it could not, stating that, "[o]n these facts, we cannot read 4(f)(3) as permitting that which has already been specifically prohibited under 4(f)(2)." *Prewitt*, 353 F.3d at 927.

The circuit court noted that the Advisory Committee Notes amplifying Rule 4 provided that, when service is effected pursuant to Rule 4(f)(3), "an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law." The court stated that this provision in the Advisory Committee Notes precluded service under Rule 4(f)(3) in this case because, "[r]ather than minimizing offense to Austrian law, the failure to obtain

OPEC's consent would constitute a substantial affront to Austrian law." *Prewitt*, 353 F.3d at 927.

The court below held that directing service of process on OPEC under Rule 4(f)(3) would constitute a clear abuse of discretion. *Id.* at 928 n.21. The Eleventh Circuit's view was that the district court simply lacked the power to fashion service under Rule 4(f)(3) because of the Headquarters Agreement.

This petition followed. Prewitt's argument is that, insofar as Rule 4(f)(3) is designed to allow service of process when a plaintiff is unable to fashion service that complies with the laws of a foreign state, both the district court and Eleventh Circuit clearly erred by stating that service on OPEC could under no circumstances be accomplished in this case.

REASONS FOR GRANTING THE WRIT

The petition for certiorari should be granted for three reasons. *First*, the petition should be granted because of the far-reaching implications of the decision below. The Eleventh Circuit's law now stands foursquare for the proposition that any foreign government can agree with any organization located within its borders—a corporation plotting to violate U.S. antitrust laws, the Cali drug cartel, the Mafia, or even al-Qaeda—that the organization can violate the laws of the United States with no fear of being held accountable for its actions in a U.S. court so long as the organization has no agent in the United States that can properly be served with process. This simply *cannot* be a proper interpretation of the Federal Rules of Civil Procedure. Indeed, the panel's opinion has the perverse effect of subverting the restrictive theory of sovereign immunity embodied in the Foreign Sovereign Immunities Act ("FSIA") by allowing any for-

eign government, at any time, to immunize any organization within its borders from liability in U.S. courts merely by entering into an agreement with that organization providing that it cannot be served with process.

Second, the petition should be granted because the decision below creates a circuit split on this increasingly important question of service of process. The Eleventh Circuit's decision directly conflicts with the Ninth Circuit's opinion *Rio Properties, Inc. v. Rio International Interlink*, 284 F.3d 1007 (9th Cir. 2002), which explicitly denies that the contrary law of a foreign state can preclude service of process under Rule 4(f)(3), and with the considered view of numerous district courts that reached the same conclusion as the Ninth Circuit.

Third, the petition should be granted because the Eleventh Circuit's opinion misinterprets Rule 4(f)(3), elevating a misreading of the Advisory Committee Notes over the plain language of the Rule, which does not provide that the law of a foreign state can immunize a defendant located within its borders from service of process effected under Fed. R. Civ. P. 4(f)(3).

I. THE DECISION BELOW CREATES A LOOPHOLE PREVENTING SERVICE OF PROCESS ON FOREIGN WRONGDOERS AND SUBVERTS THE RESTRICTIVE THEORY OF SOVEREIGN IMMUNITY EMBODIED IN THE FOREIGN SOVEREIGN IMMUNITIES ACT.

The only question that this petition for certiorari presents is whether OPEC may be validly served with process. The Eleventh Circuit's holding that OPEC cannot be legally served with process because of the Headquarters Agreement creates bad law with implications far beyond the present lawsuit. Indeed, the Eleventh Circuit's opinion creates a massive loophole allowing foreign states to protect any potential defendants located

within their borders from service of process in U.S. courts for the violation of U.S. law. This loophole is extremely consequential, and could subvert the United States' move to the restrictive theory of foreign sovereign immunity.

a. *Loophole in the service of process rules.* Rule 4(f)(3) is designed to safeguard against *any* situation where unscrupulous foreign governments attempt to insulate entities within their borders from liability for wrongdoing in U.S. courts. The Rule does so by allowing courts to fashion a means for hearing cases on the merits even where ordinary methods of service are being hindered by resourceful defendants. The interpretation and application of the law by the court below runs counter to the policy condemning attempts to evade or obstruct service of process—a policy which has led numerous courts, both state and federal, to order substituted service on defendants. *See, e.g., Int'l Controls Corp. v. Vesco*, 593 F.2d 166 (2d Cir. 1979); *Smith v. Islamic Emirate of Afghanistan*, Nos. 01 CIV 10132, 01 CIV 10144, 2001 WL 1658211 (S.D.N.Y. Dec. 26, 2001); *Morgan Guaranty Trust Co. of N.Y. v. Hauser*, 584 N.Y.S.2d 65 (N.Y. App. Div. 1992); *Hollow v. Hollow*, 747 N.Y.S.2d 704 (N.Y. Sup. Ct. 2002).

Particularly instructive in this regard is *New England Merchants National Bank v. Iran Power Generation and Transmission Co.*, 495 F. Supp. 73 (S.D.N.Y. 1980). In that case, a lawsuit was brought against Iran, Iranian agencies and instrumentalities, and private Iranian entities based on events that occurred during the 1979 Islamic Revolution. Because Iran had broken diplomatic ties with the United States, all the normal methods of service provided for explicitly by the Federal Rules had been cut off. *Id.* at 80-81. The Iranian defendants had attorneys who actively represented them before the dis-

trict court, but the defendants refused to allow service through the attorneys, and even refused to sign registered mail receipts. *Id.* In essence, the Iranian defendants actively thwarted service of process. Despite the fact that Iran was a sovereign state, the court found that it should not be allowed to intentionally avoid being served:

> This conduct can only be interpreted as an intentional avoidance on the part of Iran, its agencies and instrumentalities, of service of process in an effort to frustrate the instant suits. Justice demands that a substitute form of service be formulated, one calculated to provide defendants with adequate notice of the pendency and nature of the instant suits.

Id. at 81. The *New England Merchants* court added that (as is the case here) the defendants had actual notice of the nature and pendency of the lawsuits against them, and thus held that the defendants could be served via telex and by service upon counsel. *Id.*

Justice demands no less in this case. Indeed, granting this petition would clarify an important issue concerning the ability of foreign states to immunize defendants located within their borders from service of process in U.S. courts. Under the interpretation of the court below, an agreement between a foreign state and a defendant within that state can completely immunize the defendant from service. Thus, Colombia, Italy and Saudi Arabia could effectively insulate the Cali drug cartel, the Mafia, and al-Qaeda from service of process. Any foreign government could insulate its nationals, business organizations and unincorporated associations from suit in U.S. courts, thus leaving them free to breach contracts with U.S. firms, sell hazardous products in the United States, or violate U.S. antitrust law with impunity—provided that they took the simple step of ensuring that they had

no agent in the United States who could accept service of process on their behalf.

The circuit court's opinion would allow any foreign country to completely protect any person or organization located within its borders from the U.S. courts. That a foreign state would have the ability to do so merely by entering into an agreement identical to the Headquarters Agreement is inimical to U.S. law.

b. *Subversion of the FSIA*. For 140 years—beginning with *The Schooner Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812)—the United States subscribed to the "absolute" theory of foreign sovereign immunity, which provided nation-states with broad immunity from the judicial process of other countries. *See* Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 196 (2001). Under the absolute theory of immunity, there was no distinction between a country's public acts (those which can only be performed by governments) and its private acts (those which can also be performed by non-governmental actors, such as commercial trading): Foreign states simply could not be sued in U.S. courts, even when they were engaged in commercial activities. *Berizzi Bros. Co. v. Steamship Pesaro*, 271 U.S. 562, 574 (1926). The United States adhered to the absolute theory of sovereign immunity until May 19, 1952, when the State Department advised the Attorney General to adopt the "restrictive" theory of sovereign immunity instead, which recognized sovereign immunity only for the public acts of a state, and not for a state's private acts. *See Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments*, Letter from Jack B. Tate, Acting Legal Adviser, to Philip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952) ("Tate Letter").

The most significant rationale for the change of policy that the Tate Letter announced was the rise of socialist political systems. Continued U.S. commitment to absolute immunity would have produced the inequitable situation where private U.S. companies were amenable to suit in foreign courts, while socialist countries' state trading companies were immune to suit in the United States, even if they had, for example, breached their contracts with U.S. firms. Tate Letter, *supra*, at 985 ("[W]idespread and increasing activity on the part of governments engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined by the courts."); *see also* David MacKusick, Comment, *Human Rights vs. Sovereign Rights: The State Sponsored Terrorism Exception to the Foreign Sovereign Immunities Act*, 10 EMORY INT'L L. REV. 741, 778 (1996) ("The unfairness of subjecting a private trader to legal responsibility while granting immunity to a government engaged in the same transaction soon became apparent."). In 1976, the restrictive theory of sovereign immunity was codified into federal statutory law as the FSIA, 28 U.S.C. § 1602 *et seq*. *See Republic of Argentina v. Weltover*, 504 U.S. 607, 612 (1992) ("[T]he Act . . . largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952."); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486-89 (1983).

The holding of the court below that foreign states can completely immunize corporations or unincorporated associations within their borders from U.S. litigation for violation of U.S. laws by entering an agreement similar to the Headquarters Agreement turns the restrictive theory of sovereign immunity on its head. The court below creates a new class of businesses or unincorporated associations that can injure U.S. companies—and even file suit against U.S. companies—but cannot be sued by them. Moreover, the FSIA expressly permits service of

process on foreign states, including each of OPEC's fifteen member states. *See* 28 U.S.C. § 1608(b). Yet the decision of the court below incongruously holds that in the face of this permission to effect service on foreign states, Austria can nonetheless completely immunize an organization comprised of OPEC's fifteen member states from service of process.

The fact that the decision below would allow foreign states to provide persons and entities with complete immunity from U.S. judicial review of their wrongdoing demonstrates that this is a question of exceptional importance that should be considered by this Court.

II. THE DECISION BELOW CREATES A CIRCUIT SPLIT.

The Eleventh Circuit's *Prewitt* opinion creates a circuit split with the Ninth Circuit. While the Eleventh Circuit held that service under Rule 4(f)(3) is ineffective if specifically precluded by foreign law, the Ninth Circuit has stated explicitly that the laws of a foreign state pose no barrier to service of process under Rule 4(f)(3). This is not an inconsequential circuit split; rather, this circuit split goes to the very heart of why Rule 4(f)(3) was drafted.

The Eleventh Circuit's holding that service under Rule 4(f)(3) is ineffective if specifically precluded by foreign law directly conflicts with the Ninth Circuit's interpretation in *Rio Properties*. In *Rio Properties*, the Ninth Circuit explained that there are only two requirements for service of process to be valid under Rule 4(f)(3): The service must be directed by the court, and must not be prohibited by international agreement. 284 F.3d at 1014. The Ninth Circuit stated that "[n]o other limitations are evident from the text." *Id.* "In fact," the court continued, "as long as court-directed and not prohibited by an inter-

national agreement, service of process ordered under Rule 4(f)(3) may be accomplished *in contravention of the laws of the foreign country*." *Id.* (emphasis added). The Ninth Circuit's view clearly conflicts with the position here advanced by the Eleventh Circuit, that the service in question cannot be authorized in a manner prohibited by foreign law.

Not only does the view adopted by the lower court conflict with the Ninth Circuit's interpretation, but it also conflicts with the reasoned view of numerous district courts. *See Ryan v. Brunswick Corp.*, No. 02-CV-0133E(F), 2002 WL 1628933, at *2 (W.D.N.Y. May 31, 2002); *Forum Fin. Group, LLC v. President & Fellows of Harvard Coll.*, 199 F.R.D. 22, 23-24 & n.3 (D. Maine 2001); *Mayoral-Amy v. BHI Corp.*, 180 F.R.D. 456, 459 n.4 (S.D. Fla. 1998) (noting that "it appears to be in the power of this Court to define a method of service" under Fed. R. Civ. P. 4(f)(3) "by which the parties in Belize may be acceptably contacted, regardless of whether or not such method contravenes Belize's law"); *Semtek Int'l Inc. v. Merkuriy Ltd.*, No. 95-11820, 1996 U.S. Dist. LEXIS 22248, at *6 (D. Mass. Aug. 13, 1996) (explaining that "service may be accomplished in contravention of the laws of the foreign country . . . by order of the court" pursuant to Rule 4(f)(3)).

The Eleventh Circuit addressed only *Rio Properties*, and attempted to distinguish the present case from *Rio Properties* on its facts, without even addressing the chief principle that creates the circuit split, that "service of process under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country." *Rio Props.*, 284 F.3d at 1014. Instead of acknowledging and directly addressing this principle, the Eleventh Circuit stated that "in *Rio*, there was no discussion of Costa Rican law at all, much less of any prohibitions relating

to service of process." *Prewitt*, 353 F.3d at 928. However, under the explicit principle outlined in *Rio Properties*, service pursuant to Rule 4(f)(3) would be acceptable even in the present situation. Any factual distinctions between the two cases cannot minimize this circuit split.

The court below attempted to temper its broad holding and minimize the circuit split that it created:

> We do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law. Rather, we are satisfied that under the facts and circumstances of this case, directing service of process would constitute a clear abuse of discretion.

Prewitt, 353 F.3d at 928 n.21. Yet, as observed by the court below, the *only* apparent "facts and circumstances of this case" that led the Eleventh Circuit to conclude that service of process cannot be fashioned on OPEC was Austria's agreement with OPEC designed to prevent OPEC from being served with process without its consent. The panel's opinion thus holds that *whenever a foreign state enters into an agreement designed to insulate an entity located within that state from service in U.S. courts, that agreement is always effective.*

This circuit split is far from inconsequential. Rather, it goes to the very purposes underlying Rule 4(f)(3). Rule 4(f)(3) was crafted precisely because foreign states might attempt to unreasonably restrict service of process on defendants located within their borders. In particular, the Advisory Committee Notes to Rule 4(f)(3) explain that one purpose of the provision is to prevent foreign states from frustrating service of "a complaint seeking . . . to enforce the antitrust laws of the United States." Rule 4(f)(3) Advisory Committee Notes at 48. The

framers were concerned that a sympathetic foreign state might try to allow businesses or unincorporated associations within its borders to violate U.S. antitrust law with impunity by entering into an agreement protecting them from service of process. *This is precisely the case here, as that is exactly what the Headquarters Agreement between OPEC and Austria does.* Thus, this Court would do well to resolve the split between the Ninth and Eleventh Circuits, as this split touches on the very purposes for which Rule 4(f)(3) was drafted.

III. THE DECISION BELOW MISREADS RULE 4(F)(3).

The Eleventh Circuit's opinion elevates the Advisory Committee Notes above the plain language of Rule 4(f)(3) and, additionally, misinterprets the Advisory Committee Notes. Contrary to the circuit court's holding, under both the plain language of the Rule and the Advisory Committee Notes, the laws of foreign states pose no barrier to a district court's power to fashion service of process pursuant to Rule 4(f)(3).

A foreign law limitation is built into the service of process authorized by Rules 4(f)(2)(A) and (C). Service of process is proper under Rule 4(f)(2)(A) if it takes place "in the manner prescribed by the law of the foreign country or service in that country in an action in any of its courts of general jurisdiction." Similarly, service is proper under Rule 4(f)(2)(C) through personal delivery to the individual defendant or by any form of mail requiring a signed receipt "unless prohibited by the law of the foreign country." Thus, Rules 4(f)(2)(A) and (C) expressly make the law of the foreign state in which the defendant is located relevant to a district court's determination of whether it has the power to fashion service of process.

The language of Rules 4(f)(2)(A) and (C) stands in marked contrast to the language of Rule 4(f)(3). Rule 4(f)(3) states simply that "service upon an individual from whom a waiver has not been obtained and filed . . . may be effected in a place not within any judicial district of the United States . . . (3) by other means not prohibited by international agreement as may be directed by the court." This language does not mention any limitation imposed by the law of a foreign state, and thus in no way implies that the law of a foreign state can prevent a district court from fashioning service of process under Rule 4(f)(3).

The Ninth Circuit, after considering the language of Rule and the accompanying Advisory Committee Notes, described the two requirements for service of process under Fed. R. Civ. P. 4(f)(3): "As obvious from its plain language, service under Rule 4(f)(3) must be (1) directed by the court; and (2) not prohibited by international agreement." *Rio Props., Inc.*, 284 F.3d at 1014. The Ninth Circuit stated definitively that "*[n]o other limitations* are evident from the text." *Id.* (emphasis added); *see also* DAVID D. SIEGEL, SUPPLEMENTARY PRACTICE COMMENTARY C4-24, 28 U.S.C.A. FED. R. CIV. P. 4 at 73 (West Supp. 2000) ("It is only a method barred by 'international agreement', and presumably *specifically* barred by that agreement, that the court must stay away from.") (emphasis in original); Jeremy A. Colby, *You've Got Mail: The Modern Trend Towards Universal Electronic Service of Process*, 51 BUFF. L. REV. 337, 350-51 (2003) ("So long as the authorized method of service is not prohibited by international agreement, it need not comply with foreign law."). Thus, the *only* limitation upon a court validly directing service pursuant to Rule 4(f)(3) is that the service cannot be prohibited by international agreement.

It is undisputed in this case that court-directed service of process upon OPEC is not prohibited by any international agreement. Indeed, neither OPEC nor the court below ever claimed that service was prohibited by an international agreement within the meaning of Rule 4(f)(3). The Headquarters Agreement between Austria and OPEC is not an international agreement under Rule 4(f)(3) because the United States is not a party to the Headquarters Agreement and is therefore not bound by any of its provisions. *See* Vienna Convention on the Law of Treaties, Art. 34, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 324 (1987). Nor do any other agreements or treaties exist that might preclude OPEC from being served with process. Since service directed by the district court would not be prohibited by any "international agreement" within the meaning of the Rule, the district court plainly has the power to fashion alternative means of service under Fed. R. Civ. P. 4(f)(3).

The two propositions supplied by the circuit court for its conclusion that service on OPEC cannot lawfully be accomplished under Fed. R. Civ. P. 4(f)(3) should carry little weight with this Court. First, the court below states that the court "cannot read 4(f)(3) as permitting that which has already been specifically prohibited under 4(f)(2)." *Prewitt*, 353 F.3d at 927. Although the court does not specify the reasoning underlying that proposition, neither of the two possible arguments that could be derived from this statement are persuasive.

The argument that the foreign law limitations in Rule 4(f)(2) must of necessity apply to Rule 4(f)(3) is completely contrary to both the structure and language of Rule 4(f). Rule 4(f)(2) covers means of service on parties located in foreign countries that a court must *auto-*

matically consider valid when there is no internationally agreed means of service. It provides, *inter alia*, that a district court must consider service valid when it occurs in the manner prescribed by the law of the foreign country, or when there is either personal delivery or else delivery through mail requiring a signed receipt, so long as such delivery does not violate the laws of the foreign state. Thus, Rule 4(f)(2) is designed to make the law of the foreign state relevant in cases where service must automatically be accepted as valid by the district court.

In contrast, Rule 4(f)(3) provides for "other means [of service] not prohibited by international agreement" when service cannot successfully be accomplished pursuant to Rule 4(f)(2). Unlike Rule 4(f)(2), Rule 4(f)(3) does not enumerate means of service that a district court must automatically consider to be valid. Rule 4(f)(3) instead requires the district court to carefully consider what means of service would be proper under such circumstances. Thus, it makes structural sense that the foreign law limitations in Rule 4(f)(2) would be absent from Rule 4(f)(3).

The fact that the foreign law limitations in Rule 4(f)(2) are absent from Rule 4(f)(3) is also made perfectly clear by the language of the Rule: The language indicating that service of process must comply with foreign law *only* exists in Rule 4(f)(2), and is purposefully excluded from Rule 4(f)(3). Moreover, the disjunctive term "or" separating Rule 4(f)(2) from Rule 4(f)(3) demonstrates that the foreign law limitations of Fed. R. Civ. P. 4(f)(2) should not be read into Rule 4(f)(3). *See Rio Props., Inc.*, 284 F.3d at 1015 ("Indeed, Rule 4(f)(3) is one of three separately numbered subsections in Rule 4(f), and each subsection is separated from the one previous merely by the simple conjunction 'or.' "); *see also Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)

("Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings . . . ."). The framers of the Federal Rules clearly knew how to include the foreign law limitation in Rule 4(f)(3), yet declined to do so. On numerous occasions, this Court has refused to read language into statutory provisions when Congress knew how to include such language, yet did not do so. The same standards should apply to an interpretation of the Federal Rules. *See Chapman v. United States*, 500 U.S. 453, 459 (1991) ("Congress knew how to indicate that the weight of the pure drug was to be used to determine the sentence, and did not make that distinction with respect to LSD."); *Lehman v. Nakshian*, 453 U.S. 156, 162 (1981) ("Congress . . . demonstrated that it knew how to provide a statutory right to a jury trial when it wished to do so elsewhere in the very 'legislation cited[.]' But in § 15 it failed explicitly to do so.") (citation omitted); *United States v. Healy*, 376 U.S. 75, 84 (1964) ("Congress knew how to choose words to refer solely to commercial airliners when it wished to do so.").

The second potential meaning of the Court's argument—that if service by registered mail could not be lawfully accomplished pursuant to Rule 4(f)(2), then it cannot be lawfully accomplished under Rule 4(f)(3) either—is equally invalid. Initially, there are numerous methods of accomplishing service pursuant to Rule 4(f)(3) that do not involve registered mail, including service by e-mail, *see Rio Props.*, 284 F.3d at 1017-18, by fax transmission, *see Ryan*, 2002 WL 1628933, at *2, or by publication, *see Smith*, 2001 WL 1658211, at *2-*3. Moreover, the fact that the *method* of service that might be court directed under Rule 4(f)(3)—*e.g.*, service by mail—is the same as previously made *without* court direction is irrelevant. The key is that after a judge has authorized the service pursuant to Rule 4(f)(3), that ser-

vice is legitimate *even if* it contravenes the law of a foreign state. The relevant difference is that service under Rule 4(f)(2) is made by the Clerk of the Court without prior judicial consideration, whereas Rule 4(f)(3) requires such consideration. A decision to fashion alternative means of service under Rule 4(f)(3) thus appropriately carries with it the authority of the judicial branch when the service directed contravenes foreign law. Reading the foreign law limitations of Rule 4(f)(2) into Rule 4(f)(3) is therefore contrary to the plain language, the structure, and the purpose of Rule 4.

The circuit court's second argument for why service cannot be effected on OPEC under Fed. R. Civ. P. 4(f)(3) was based on the 1993 Advisory Committee Notes, which state:

> Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements. . . . Inasmuch as our Constitution requires that reasonable notice be given, an earnest effort should be made to devise a method of communication that is consistent with due process and minimizes offense to foreign law.

Based on the Advisory Committee Notes' observation that "an earnest effort should be made to devise a method of communication that . . . minimizes offense to foreign law," the court below created a completely new requirement for service under Rule 4(f)(3): that it must not be specifically prohibited by the law of the foreign country. The fact that the court below ruled that service upon OPEC was impossible because of the Headquarters Agreement is crystal clear: The court stated that "directing service of process would constitute a clear abuse of discretion" in this case. *See Prewitt*, 353 F.3d at 928 n.21.

The first problem with the circuit court's creation of this new requirement is that it "[e]levate[s] to the level of statutory text a phrase taken from the legislative history" of Rule 4. *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 252 (1989) (Scalia, J., dissenting). This is clearly unacceptable. *See Administrator, FAA v. Robertson*, 422 U.S. 255, 262-63 (1975) (noting that resort to legislative history is only compelled when the plain language is "unclear and ambiguous"); *Clark v. Long*, 255 F.3d 555, 559 (8th Cir. 2001) ("An advisory committee note, of course, does not have the force of law . . . ."); *In re Evanston Motor Co.*, 735 F.2d 1029, 1032 (7th Cir. 1984) (basing its interpretation of Fed. R. Bankr. P. 509(c) on the plain language of the rule, and holding that the Advisory Committee Notes would not be controlling if they contradicted the plain language). The circuit court cannot derive a requirement for service under Fed. R. Civ. P. 4(f)(3) from the Advisory Committee Notes if such a requirement is absent from the language of the Rule.

Moreover, the circuit court's interpretation of the Advisory Committee Notes is flawed. The Notes state only that "an earnest effort should be made to devise a method of communication that . . . minimizes offense to foreign law." The circuit court transforms the suggestion that the method of service should "minimize offense" to foreign law into a *requirement* that service cannot contravene a foreign state's laws. This interpretation is unacceptable. First, the Advisory Committee's statement that the district court should make "an earnest effort" to minimize offense is not a requirement binding upon the court, but is only a *guideline* for proceeding with service of process. Moreover, minimizing offense to foreign law is *not* the same as refusing to violate foreign law. In fact, even the suggestion that offense to foreign law must be "minimize[d]" demonstrates that service fashioned pur-

suant to Rule 4(f)(3) *is legitimate even if it does violate the law of a foreign state.*

Thus, the court below based its conclusion that service of process cannot lawfully be effected on OPEC under the Federal Rules of Civil Procedure not on the text of the Rule, but rather on the Advisory Committee Notes. And even the Advisory Committee Notes do not support the circuit court's conclusion that OPEC cannot be lawfully served under the Federal Rules, because they only state that a court fashioning alternative means of service under Rule 4(f)(3) must endeavor to "minimize offense" to foreign law; the Advisory Committee Notes do not put forward any kind of requirement concerning compliance with the law of a foreign state.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11580
D. C. Docket No. 00-00865-CV-C-S

PREWITT ENTERPRISES, INC., on its own behalf and on behalf of all others similarly situated,

Plaintiff-Appellant,

—versus—

ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Alabama

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(December 18, 2003)

Before ANDERSON, BARKETT and RONEY, *Circuit Judges*.

BARKETT, *Circuit Judge*:

Prewitt Enterprises, Inc. ("Prewitt") appeals from the dismissal of its complaint against the Organization of the Petroleum Exporting Countries ("OPEC") for insufficient service of process and from the denial of its motion for alternative service of process. Prewitt's complaint against OPEC alleged a violation of the Sherman Act, 15 U.S.C. § 1,[1] for illegal price-fixing agreements on production and export of crude oil and claimed equitable relief pursuant to the Clayton Act, 15 U.S.C. § 26.[2]

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[1] 15 U.S.C § 1 states that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[2] 15 U.S.C. § 26 provides that:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. . . . In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

Because OPEC initially did not respond to the complaint, the district court entered a default final judgment against OPEC enjoining it from entering into, implementing or enforcing any agreements to fix and control the production and export of crude oil for one year. OPEC then appeared and moved to vacate the default judgment and injunction on the grounds that OPEC had never been properly served with process, and thus, the court lacked jurisdiction over it. The district court concluded that, because OPEC resides in Austria and the applicable Austrian law prohibits service without OPEC's consent, Prewitt's complaint must be dismissed for lack of jurisdiction. We agree and affirm the dismissal of Prewitt's complaint for lack of jurisdiction because service of process on OPEC has not been effectuated. We also affirm the district court's denial of alternative service of process because, in this case, there are no means available for service upon OPEC under the Federal Rules of Civil Procedure.

I. BACKGROUND

Prewitt is a corporation organized and existing under the laws of Alabama with its principal place of business in Birmingham, Alabama. Prewitt purchases substantial quantities of gasoline and other refined petroleum products for resale at its Eastwood Texaco Service Center gasoline station.

OPEC is an intergovernmental organization originally established in 1960 via resolutions promulgated at the Conference of the Representatives of the Governments of Iran, Iraq, Kuwait, Saudi Arabia and Venezuela in Baghdad, Iraq. The principal aim of OPEC is "the coordination and unification of the petroleum policies of Member Countries and the determination of the best

means for safeguarding their interests, individually and collectively." OPEC Stat. art. 2(A) (2000). Presently, OPEC's membership consists of: Algeria, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates and Venezuela. Since September 1, 1965, OPEC has been headquartered in Vienna, Austria. Its relationship with the Austrian government is governed by the Agreement Between the Republic of Austria and the Organization of the Petroleum Exporting Countries Regarding the Headquarters of the Organization of the Petroleum Exporting Countries, February 18, 1974, *BGBL* 1974/382 ("Austrian/OPEC Headquarters Agreement" or "Headquarters Agreement").

Prewitt filed a complaint with the district court against OPEC on behalf of itself and as the representative of all persons or entities who have indirectly purchased petroleum or petroleum products in the United States since March 1999. Prewitt claimed that OPEC has been coordinating an international conspiracy through agreements among its Member States and non-OPEC members to limit the production and export of oil in order to fix world oil prices above competitive levels. Prewitt argued that these agreements constitute violations of United States antitrust laws, specifically the Sherman and Clayton Acts, and have resulted in a substantial and adverse impact on United States trade and commerce. Prewitt claimed that as a result of OPEC's illegal conduct, its own acquisition and inventory costs for gasoline have increased significantly. Consequently, Prewitt requested that the court declare the OPEC-coordinated agreements illegal under United States law, enjoin implementation of the agreements, grant any other appropriate equitable relief, and award costs of the suit against OPEC for injuries sustained by Prewitt.

Prewitt attempted service on OPEC by requesting that the trial court send a copy of the complaint to OPEC by international registered mail, return receipt requested. The court clerk did so, mailing Prewitt's summons and complaint to OPEC at its headquarters in Vienna. The pleadings were signed for, stamped "received" by OPEC's Administration and Human Resources Department, and forwarded to the Director of OPEC's Research Division as well as other departments including the Secretary General's office. Ultimately, the Secretary General decided that the OPEC Secretariat would not take any action with regard to the summons and complaint.

Without the participation of OPEC, the district court certified a class defined as all persons or entities who purchased refined petroleum products in the United States from March 1999 to the present and entered a default final judgment and order of injunction against OPEC. The court found that there was a conspiracy between OPEC, its Member States, and non-OPEC members, namely Norway, Mexico, the Russian Federation and Oman, to fix and control crude oil prices; that the agreements coordinated and implemented by OPEC were illegal under United States antitrust laws; that OPEC's illegal conduct has resulted in substantial and adverse impact on United States trade and commerce of approximately $80-120 million per day; and that OPEC and those acting in concert with OPEC should be enjoined from entering into, implementing, and enforcing any further oil pricefixing agreements for a period of twelve months. Copies of the court's orders were delivered to each of the United States embassies for the Member States of OPEC.

In response, OPEC made a special appearance and filed a motion to set aside the default judgment and stay its enforcement pursuant to Rule 60(b)(1), (4), (5) and

(6)[3] of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."), which the district court granted, vacating the default judgment and injunction.[4] OPEC then filed a motion to dismiss Prewitt's complaint on various grounds including insufficient service of process pursuant to Fed. R. Civ. P. 12(b)(5).[5] The district court dismissed the case without prejudice, finding that Prewitt had failed to serve OPEC its summons and complaint properly under the Federal Rules. Prewitt then filed a motion to pursue alternative means of effecting service or to amend the judgment. The district court denied the motion finding that, in this case, OPEC cannot be effectively served with process.

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[3] Fed. R. Civ. P. 60(b) provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding, for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (4) the judgment is void; (5) . . . it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

[4] Prewitt also appeals the district court's decision to vacate the default judgment and injunction. We need not reach that issue in light of our disposition of this case.

[5] Fed. R.Civ. P. 12(b)(5) provides that:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto . . . except that the following defenses may at the option of the pleader be made by motion: . . . (5) insufficiency of service or process . . . .

II. DISCUSSION

We review the district court's grant of a motion to dismiss for insufficient service of process under Fed. R. Civ. P. 12(b)(5) by applying a *de novo* standard to the law and a clear error standard to any findings of fact. *S & Davis Int'l, Inc. v. Republic of Yemen,* 218 F.3d 1292, 1298 (11th Cir. 2000). We generally review the district court's interpretation of Fed. R. Civ. P. 4 on service of process as a matter of law *de novo. Vencor Hosp., Inc. v. Standard Life & Accident Ins.,* 279 F.3d 1306, 1308 (11th Cir. 2002). Likewise, the district court's interpretation of foreign law in determining sufficiency of service of process is subject to *de novo* review. *United States v. McNab,* 331 F.3d 1228, 1240 (11th Cir. 2003) (citing *United States v. Gecas,* 120 F.3d 1419, 1424 (11th Cir. 1997) *(en banc)).* However, we join our sister circuit in holding that the district court's denial of a motion for alternative service of process under Fed. R. Civ. P. 4(f)(3) is subject to an abuse of discretion standard because the plain language of the rule stipulates that the district court "may" direct alternative means of service. *Rio Properties, Inc. v. Rio Int'l Interlink,* 284 F.3d 1007, 1014 (9th Cir. 2002).

The threshold issue in this case is whether OPEC has been effectively served under the Federal Rules of Civil Procedure. If it has not, we must then determine whether extraterritorial service of process on OPEC may be effectuated at all under the circumstances here. By definition, "service of summons is the procedure by which a court having venue and jurisdiction of the subject matter of the suit asserts jurisdiction over the person of the party served." *Miss. Publ'g Corp. v. Murphree,* 326 U.S. 438, 444-45 (1946). A court is required to have personal jurisdiction under the Due Process Clauses of the Fifth

and Fourteenth Amendments to the United States Constitution "as a matter of individual liberty" so that "the maintenance of the suit . . . [does] not offend 'traditional notions of fair play and substantial justice.' " *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702-03 (1982) (quoting *Int'l Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)).

There are two rules of federal civil procedure that apply to service of process upon an international entity located outside of United States jurisdiction: Fed. R. Civ. P. 4(f) (Service Upon Individuals in a Foreign Country) and Fed. R. Civ. P. 4(h) (Service of Process Upon Corporations and Associations). The latter governs service on unincorporated associations located outside of the United States and provides that:

> Unless otherwise provided by federal law, service upon a[n] . . . unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected: . . .
>
> > (2) in a place not within any judicial district of the United States in *any manner prescribed for individuals by subdivision (f)* except personal delivery . . . . (emphasis added).

Fed. R. Civ. P. 4(h)(2). Thus, an "unincorporated association"[6] headquartered outside of the United States that

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[6] The district court treated OPEC as an unincorporated association pursuant to Fed. R. Civ. P. 17(b)(1). Under this Circuit's jurisprudence, an unincorporated association is defined as "a body of persons acting together, without a charter, but upon the methods and forms used by corporations, for the prosecution of some common enterprise." *Penrod Drilling Co. v. Johnson,* 414 F.2d 1217, 1222 (5th Cir. 1969) (holding that labor unions, agricultural societies, co-ops, banking associations, charitable associations, news associations, and religious societies may all be considered unincorporated associa-

is (1) subject to suit under a common name[7] and (2) has not waived service[8] may be served in any manner authorized under Fed. R. Civ. P. 4(f) for individuals in a foreign country except for personal delivery.

Turning to Fed. R. Civ. P. 4(f), the first relevant section provides that:

> Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:
>
> (1) by any internationally agreed means reasonably calculated to give notice, such as those

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tions). But see *Dean v. Barber*, 951 F.2d 1210, 1215 n.4 (11th Cir. 1992) (holding that a government unit, subdivision or agency may not be considered an unincorporated association). Cf. *Hennessey v. Nat'l Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977) (treating a college athletic association in an antitrust suit as an unincorporated association even where some of its members were state institutions rather than individuals).

In this case, OPEC is an administrative body joined together for the common purpose of acting on behalf of the business and political interests of its members with regard to their petroleum resources. While its members are sovereign nation states rather than private individuals, OPEC is not a governmental unit or subdivision and is not incorporated under the laws of any one Member State. Thus, under the facts of this case, we agree that it is amenable to the designation of "unincorporated association." As the court in *Penrod* has found, the term unincorporated association is one that is "generic" and of "vague meaning" with few "sharp legal boundaries." *Penrod Drilling Co.*, 414 F.2d at 1222-23.

[7] In this case, it is clear that suit was brought against OPEC, the common name for this international organization of sovereign oil-producing foreign states.

[8] No evidence has been presented by either party that any waiver of service was "obtained and filed" from OPEC.

> means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents . . . .

Fed. R. Civ. P. 4(f)(1). In this case, no other means of service has been "otherwise provided by federal law" nor is there an "internationally agreed means reasonably calculated to give notice such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents . . . ." The federal laws pertaining to service of process on a foreign entity are codified in 28 U.S.C. §§ 1602 *et seq.*, the Foreign Sovereign Immunities Act ("FSIA"), and 22 U.S.C. §§ 288 *et seq.*, the International Organizations Immunities Act ("IOIA"). The parties agree that neither of these federal laws apply to OPEC in this case.[9] The parties

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[9] It is clear that OPEC is not a foreign state or political subdivision of a foreign state pursuant to § 1608 of the FSIA. OPEC also fails to qualify under § 288 of the IOIA because the statute only applies to international organizations in which the United States participates pursuant to a treaty or an act of Congress. Cf. *Int'l Assoc. of Machinists & Aerospace Workers v. OPEC*, 477 F.Supp. 553 (C.D. Cal. 1979), aff'd 649 F.2d 1354 (9th Cir. 1981) (dismissing OPEC as a party to the case because it held that OPEC could not be legally served under the FSIA or IOIA). We note that under the current state of our federal laws, the individual Member States of OPEC are afforded immunity from suit brought for damage caused by their commercial activities when they act through OPEC. However, acting individually, a country would be subject to suit under the commercial activity exception of the FSIA § 1605(a)(2) which provides that a foreign state has no immunity from suit in cases "in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."

likewise agree that there is no international agreement that stipulates the appropriate means of service.[10]

Thus, we must look to the remainder of Fed. R. Civ. P. 4(f), which provides for other methods by which an unincorporated association may be served in the absence of relevant federal law or international agreements:

> (2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:
>
> > (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or
> >
> > (B) as directed by the foreign authority in response to a letter rogatory or letter of request; or
> >
> > (C) unless prohibited by the law of the foreign country, by
> >
> > > (i) delivery to the individual personally of a copy of the summons and the complaint; or
> > >
> > > (ii) any form of mail requiring a signed receipt, to be addressed and dispatched by

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[10] The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters Done at The Hague, the Netherlands, November 15, 1965, 658 U.N.T.S. 163 ("Hague Service Convention"), provides rules governing service of process between signatory states. However, while the United States is party to the Hague Service Convention, Austria is not. Austria *is* party to the Hague Convention on Civil Procedure, entered into force March 1, 1954, 286 U.N.T.S. 265, 1 Am. J. Comp. L. 282 (1952) (translation), but the United States is not.

> the clerk of the court to the party to be served; or
>
> (3) by other means not prohibited by international agreement as may be directed by the court.

Fed. R. Civ. P. 4(f)(2) and (3).

Prewitt originally chose to attempt service of process on OPEC under Fed. R. Civ. P. 4(f)(C)(ii). However, the method set forth under that provision applies only if it is not prohibited by the law of the foreign country. Based on the evidence presented,[11] the district court correctly found that service on OPEC was prohibited by the law of Austria. Article 5(2) of the Austrian/OPEC Headquarters Agreement provides that: "the service of legal process

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[11] Evidence on service of process in Austria under Austrian and international law was considered by the district court pursuant to Fed. R. Civ. P. 44.1 (Determination of Foreign Law), which provides that:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

The evidence before the district court included: sections of Austrian law from the Austrian Constitution, the Austrian Service Act, and the Austrian Code of Civil Procedure; articles of international treaties such as the Vienna Convention on the Law of Treaties, entered into force January 27, 1980, 1155 U.N.T.S. 331, and the Austrian/OPEC Headquarters Agreement; expert affidavits and testimony from Austrian lawyers and professors on Austrian law; correspondence between Austrian law experts; "Notes Verbales" between the Austrian Ministry of Foreign Affairs and OPEC; correspondence from the Austrian Embassy to the District Court for the Northern District of Alabama on service of process in Austria; the United States State Department circular on service of process abroad; the Austrian Foreign Ministry website on Austrian law; and academic treatises on transnational litigation.

. . . shall not take place within the [OPEC] headquarters seat except with the express consent of, and under conditions approved by, the Secretary General."[12] Since the Headquarters Agreement was enacted into law by resolution of the Austrian Parliament and published in the Austrian Official Gazette pursuant to the Austrian Constitution, the district court found it to be an integral part of Austrian law.[13] Thus, because service was prohibited

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[12] As noted in some of the *amicus curiae* briefs submitted to this Court, this provision is commonly found in numerous other Headquarters Agreements between sovereign states and international organizations around the world. See *e.g.* Headquarters Agreement between the Organization of American States and the Government of the United States of America, signed May 14, 1992, art. IX, §1, <*http://www.oas.org/legal/english/docs/BilateralAgree/us/*sedeusa.htm> ("The service and execution of legal process . . . may take place within the Headquarters only with the consent of and under conditions approved by the Secretary General."); Agreement Regarding the Headquarters of the Food and Agriculture Organization of the United Nations, signed October 31, 1950, art. III, § 7(a), 1409 U.N.T.S. 23602 ("The service of legal process . . . may take place within the headquarters seat only with the consent of, and under conditions approved by, the Director-General."); and the Agreement Relating to the Headquarters of the International Bauxite Association between the International Bauxite Association and Jamaica, signed November 5, 1975, art. III, § 4, 1021 U.N.T.S. 15000 ("The service of legal process . . . may take place within the Headquarters premises only with the express prior consent of and under conditions approved by the Secretary General.")

[13] We reject Prewitt's argument that because the Headquarters Agreement is not a criminal statute with criminal sanctions but merely a "diplomatic accommodation," it does not actually "prohibit" service upon OPEC within the meaning of Fed. R. Civ. P. 4(f)(2)(C)(ii). The Headquarters Agreement has been incorporated into Austrian law and need not provide for criminal sanctions to enforce its prohibition of service upon OPEC without OPEC's consent. We also reject Prewitt's argument that Article 5(2) of the Headquarters Agreement only bars physical intrusions into the OPEC

by Austrian law, Prewitt could not have effectively served OPEC under Fed. R. Civ. P. 4(f)(C)(ii).

Prewitt nonetheless suggests that we should liberally construe the formal requirements for service under the Federal Rules because OPEC received actual notice but simply chose to "ignore the whole thing." Br. of Appellant at 23. However, we find no support for such an argument.[14] Due process under the United States Con-

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headquarters seat by the Republic of Austria or by persons exercising public authority within Austria and thus does not apply to service by international mail from someone outside of Austria. Nothing in the plain language of Article 5(2) of the Headquarters Agreement indicates that the drafters intended for such a narrow interpretation.

[14] It is true that receipt of actual notice is an important factor in considering whether service of process is adequate. *Hanna v. Plumer*, 380 U.S. 460, 463 n.1 (1965) (dictum); *Milliken v. Meyer*, 311 U.S. 457, 463 (1940). However in all of the cases cited by Prewitt, the courts were careful to determine that service of process was in substantial compliance with the formal requirements of the Federal Rules; actual notice alone was not enough to allow the court personal jurisdiction over the defendant. See *Sanderford v. Prudential Ins. Co. of America*, 902 F.2d 897 (11th Cir. 1990) (holding that service of process was in substantial compliance with Fed. R. Civ. P. 4(b) even though it did not include a return date for the responsive pleading); *Direct Mail Specialists, Inc. v. Eclat Computerized Tech. Inc.*, 840 F.2d 685 (9th Cir. 1988) (finding that a corporation's receptionist had sufficient authority to receive service of process as a "managing or general agent" under Fed. R. Civ. P. 4(d)(3) and noting that the president of the company received actual notice of the summons and complaint a day later); *United Food & Commercial Workers Union v. Alpha Beta Co.*, 736 F.2d 1371 (9th Cir. 1984) (holding that service was effective under Fed. R. Civ. P. 4(b) even though the summons had a typographical error stating that the defendant had 10 rather than 20 days to answer the complaint); *Banco Latino, S.A.C.A. v. Gomez Lopez*, 53 F.Supp. 2d 1273 (S.D. Fla. 1999) (finding that personal delivery of service of process on the defendant in Spain was sufficient because it was authorized under Spanish law as required by the Hague Convention and Fed. R. Civ. P. 4(f)(1) and the defendant had

stitution requires that "before a court may exercise personal jurisdiction over a defendant, there must be *more than* notice to the defendant . . . [t]here also must be a *basis* for the defendant's amenability to service of summons. Absent consent, this means there must be *authorization* for service of summons on the defendant." *Omni Capital Int'l v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987) (emphasis added).[15] In other words, an individual or entity "is not obliged to engage in litigation unless [officially] notified of the action . . . under a court's authority, by formal process." *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 347 (1999). In this case, Fed. R. Civ. P.(f)(2)(C)(ii) clearly states that service of process by registered mail is only authorized where it is not prohibited by foreign law. Here, the Headquarters Agreement constitutes Austrian law and, under Article 5(2), expressly prohibits all service of process upon OPEC within the headquarters seat that has not been consented to by its Secretary General. Thus, we agree with the district court that even though OPEC had actual notice of the filing of the suit, service of process was ineffective because it was clearly not in substantial compliance with the requirements of Fed. R. Civ. P. 4(f)(2)(C)(ii).

Alternatively, Prewitt argues that even if service failed under Fed. R. Civ. P. 4(f)(2)(C)(ii), service by registered mail upon OPEC nonetheless complied with Fed. R. Civ. P. 4(f)(2)(A), which permits service if it is effectuated "in the manner prescribed by the law of the foreign

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actual notice even though he only received a copy of the summons and not the complaint because he departed hastily).

[15] "Personal jurisdiction is a composite notion of two separate ideas: amenability to jurisdiction, or predicate, and notice to the defendant through valid service of process." *DeMelo v. Toche Marine, Inc.*, 711 F.2d 1260, 1264 (5th Cir.1983).

country for service in that country in an action in any of its courts of general jurisdiction." The provisions of Austrian law that Prewitt references from Austria's Civil Procedure Code and regulations for service of process by mail relate to service by Austrian courts on persons resident in Austria and abroad. None of these Austrian law provisions directly pertain to service mailed *from abroad* upon international organizations resident in Austria. Prewitt argues that we should look only to the approved "method" of service within the foreign jurisdiction and not to the substance of Austrian law. However, the substance of the law specifically relating to service of process cannot be divorced from the "method" of service. Indeed, §§ 12(1) and 11(2) of the Austrian Service Act specifically address service from authorities abroad upon residents in Austria and trump the more general provisions cited by Prewitt from the Austrian Code of Civil Procedure and regulations for service of process by Austrian courts on residents in Austria or abroad.[16] Moreover, the Regulation Regarding the Service of Process by Mail upon Persons Abroad in Civil Proceedings that Prewitt argues applies in this case specifically states that it *does not* apply to service on entities specified under § 11(2) of the Austrian Service Act. Dist. Ct. Doc. 87, Exh. 4B. Section 12(1) (as amended 1990) of the Austrian Service Act requires that:

> The service of documents generated by authorities abroad to recipients in Austria shall be carried out in accordance with the existing international conventions, *in the absence of which it has to be done in accordance with this law* . . . . (emphasis added).

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[16] Expert Decl. of Dr. Wolfgang Hahnkamper, Dist. Ct. Doc. 56, Exh. 8 at 4.

Section 11(2) (as amended 1998) of the Austrian Service Act directly addresses service from abroad upon international organizations such as OPEC requiring that:

> the mediation of the Federal Ministry for Foreign Affairs shall be enlisted in undertaking service of process on foreigners or international organizations that enjoy privileges and immunities under international law, regardless of their place of residence or headquarters.

There would be no way for Prewitt to serve OPEC under § 11(2) of the Austrian Service Act because we must assume that if it had gone to the Austrian Federal Ministry of Foreign Affairs, the Ministry would have applied the laws of its own country and obeyed the dictates of the Austrian/OPEC Headquarters Agreement prohibiting service without OPEC's consent.

In response, Prewitt again argues that actual notice can cure defective service of process pursuant to Section 7 of the Austrian Service Act, which provides:

> Should defects in service of process occur, service shall be deemed effectuated at the time when the document has actually reached the recipient designated by the authority.

Section 7 (as amended January 1, 1991) of the Austrian Service Act. However, this section has specifically been interpreted in Austria not to apply to defects in service of process that are in breach of the requirements for service under an international agreement such as the Austrian/OPEC Headquarters Agreement.[17] Moreover, Section 7

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[17] The Austrian Administrative Court ("Verwaltungsgerichtshof") has held that a breach of a rule in an international agreement on service of process was not a "simple defect of service" that could be cured by Section 7 of the Austrian Service Act. The court stated the rule that:

may not cure a failure to obtain OPEC's express consent because under the Austrian law of *lex specialis*, the more specific provision in the Headquarters Agreement for service of process upon OPEC takes precedence over the more general language of the Austrian Service Act. Expert Decl. of Dr. Wolfgang Hahnkamper, Dist. Ct. Doc. 80, Exh. 5 at 416-17, 420-21.[18] Finally, Prewitt contends that even if its service by registered mail on OPEC could not be effectuated pursuant to any of the provisions of Fed. R. Civ. P. 4(f)(2), the district court still had the discretion to order service of process pursuant to Fed. R. Civ. P. 4(f)(3), which provides that service may be effected "by *other means* not prohibited by international agreement as may be directed by the court." (emphasis added). We agree with Prewitt that a district

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> [S]imple consideration of the generally acknowledged rules of public law, which apply according to Art. 9(1) B-VG [Federal Constitutional Act] as constituents of Federal law, and which include the principle that contracts are to be performed in good faith . . . prohibits § 7 of the Service Act from being afforded the content that it should also reform breaches of explicit prohibitions on service contained in international agreements . . . .

Verwaltungsgerichtshof [VwGH] Beschlul3, December 18, 1997, No. 97/11/0274 (Aus.).

[18] Prewitt similarly argues that because OPEC failed to immediately reject the pleadings sent to it by international registered mail, return them, or lodge diplomatic protests with the United States, its actual receipt of the pleadings constituted constructive consent or waiver of the protection under Article 5(2) of the Headquarters Agreement that OPEC may only be served where it has expressly consented to service of process. Br. of Appellant at 31 n.9. We reject this argument because Article 5(2) must be read together with Article 9 of the Headquarters Agreement, which provides that "OPEC . . . shall enjoy immunity from *every form of legal process* except in so far as in any particular case OPEC shall have *expressly waived* its immunity . . . (emphasis added)."

court's denial of relief under 4(f)(3) is reviewed under an abuse of discretion standard. However, there is no abuse of discretion here; on the contrary, any circumvention of 4(f)(2)(C)(ii) by the district court in directing service again by registered mail would constitute such an abuse. On these facts, we cannot read 4(f)(3) as permitting that which has already been specifically prohibited under 4(f)(2).

Prewitt then argues that, even if service by registered mail is prohibited by 4(f)(2), other means of giving actual notice, such as fax or e-mail, that are not mentioned in the rule or prohibited by international agreement could be employed to serve OPEC under Fed. R. Civ. P. 4(f)(3), even if the service is contrary to the laws of Austria.[19] However, the 1993 Advisory Committee Notes to Fed. R. Civ. P. 4(f)(3) instruct that:

> Paragraph (3) authorizes the court to approve other methods of service not prohibited by international agreements. . . . Inasmuch as our Constitution

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[19] In support of its argument, Prewitt cites to *Umbenhauer v. Woog*, 969 F.2d 25, 34 (3d Cir. 1992), which held that "Rule 4(i)(1) neither explicitly or implicitly requires any deference to foreign governments or the U.S. Department of State in the manner by which service shall be made." However, Fed. R. Civ. P. Rule 4(i)(1) was the predecessor to the current Fed R. Civ. P. 4(f)(2)(C)(ii) for service of process by registered mail, not Fed. R. Civ. P. 4(f)(3), which is at issue here. In any event, the *Umbenhauer* court pointed out that the 1993 amendments to the Federal Rules on service specifically provided for greater deference generally to foreign law. As the court noted, "the Standing Rules Committee of the Judicial Conference of the United States recently drafted relevant proposed revisions to Fed.R.Civ.P. 4" and that "[i]f proposed Rule 4(f)(2)(C) were in effect today, then contrary to our holding here, the new Rule would preclude a district court clerk from serving process by signed receipt mail on a defendant in a country whose laws forbid that method of service." *Id.* at 33.

> requires that reasonable notice be given, *an earnest effort* should be made to devise a method of communication that is *consistent with due process* and *minimizes offense to foreign law.*

(emphasis added). Rather than minimizing offense to Austrian law, the failure to obtain OPEC's consent would constitute a substantial affront to Austrian law. We can find no support permitting such a consequence in the face of Austria's direct prohibition of service on OPEC without its consent.[20] The case relied upon as persuasive by Prewitt, *Rio Properties, Inc. v. Rio Int'l Interlink,* 284 F.3d 1007, 1014 (9th Cir. 2002), is not at all applicable to the circumstances here. In *Rio,* the court held that the district court did not abuse its discretion by ordering service by email upon an international corporation based in Costa Rica. However, the primary issue in that case was whether Fed. R. Civ. P. 4(f) should be read to create a hierarchy of preferred methods of service of process, requiring a party to attempt service by the methods enumerated in Fed. R. Civ. P. 4(f)(2) before petitioning the court for alternative relief under Fed. R. Civ. P. 4(f)(3). More importantly, the facts supporting the district court's direction of alternative service in *Rio* are completely different from the facts here. In *Rio,* the

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[20] Prewitt also cites to *In re Ski Train Fire in Kaprun, Austria on Nov. 11, 2000,* 2003 WL 21659368 (S.D.N.Y. July 15, 2003) (unpublished), where again there was no Austrian law explicitly prohibiting service of process on the defendant, an Austrian corporation, without its consent. We do not find this case applicable. But see *Mayoral-Amy v. BHI Corp.,* 180 F.R.D. 456 (S.D. Fla.1998) (declining to authorize service of process by facsimile under Fed. R. Civ. P. 4(f)(3) where doing so would be in contravention of Belize law); *Lord v. Living Bridges,* 1999 WL 528833 (E.D. Pa. 1999) (unpublished) (ordering plaintiffs to serve defendants under Fed. R. Civ. P. 4(f)(3) in a manner that was not prohibited by international agreement or applicable Mexican law).

court determined that the defendant, an international internet company doing business in the United States, had a viable presence in the United States; that physical personal service had been legally attempted by actually serving a legitimate agent of the defendant in the United States; and that the defendant had evaded the attempted service. The most important distinction, however, is that in *Rio,* there was no discussion of Costa Rican law at all, much less of any prohibitions relating to service of process and thus, no need to take into account the advisory note to Fed. R. Civ. P. 4(f)(3) directing that alternative service of process should minimize offense to foreign law.[21]

Austrian law clearly provides protection to OPEC as an international organization from all methods of service of process without its consent and also requires that any service of process from abroad be effected through Austrian authorities. In this case, OPEC has made clear that it refuses to consent expressly to service of process by Prewitt; thus, the district court did not abuse its discretion in denying Prewitt's motion to authorize alternative means of service.

III. CONCLUSION

Based on the foregoing, we **AFFIRM** the district court's motion to dismiss this case for insufficient service of process and its denial of alternative service of process on OPEC.

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[21] We do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law. Rather, we are satisfied that under the facts and circumstances of this case, directing service of process would constitute a clear abuse of discretion.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-11580
FILED March 2, 2004

PREWITT ENTERPRISES INC., on its own behalf and on behalf of all others similarly situated,

Plaintiff-Appellant,

—versus—

ORGANIZATION OF PETROLEUM EXPORTING COUNTRIES,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Alabama

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Opinion _____, 11th Cir., 19__, ___F.2d ___).

Before: ANDERSON, BARKETT and RONEY, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

[ILLEGIBLE] BARKETT
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 00-C-0865-S
FILED August 2, 2002

PREWITT ENTERPRISES, INC., on its own behalf and on behalf of all others similarly situated,

Plaintiff,

—vs.—

ORGANIZATION OF THE PETROLEUM PETROLEUM EXPORTING COUNTRIES,

Defendent.

ORDER OF DISMISSAL

Consistent with the accompanying Memorandum Opinion, Plaintiff's claims are hereby DISMISSED, without prejudice.

Costs are taxed as paid.

DONE this 2d day of August, 2002.

U. W. CLEMON
Chief United States District Judge
U. W. Clemon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DISTRICT

Civil Action Number 00-C-0865-S
FILED August 2, 2002

PREWITT ENTERPRISES, INC., on its own behalf and on behalf of all others similarly situated,

Plaintiff,

—vs.—

ORGANIZATION OF THE PETROLEUM PETROLEUM EXPORTING COUNTRIES,

Defendant.

MEMORANDUM OPINION ON DEFENDANT'S MOTION TO DISMISS FOR INADQUATE SERVICE OF PROCESS

This case implicates one of the pillars of American jurisprudence. "Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant." *Murphy Brothers, Inc. v. Mitchell Pipe Stringing, Inc.*, 526 U.S. 344, 350 (1999). The question before the Court in this important case is thus fairly straightforward: Has the

Plaintiff Prewitt Enterprises, Inc. ("Prewitt") properly served process on Defendant Organization of Petroleum Exporting Countries ("OPEC"). For the reasons which follow, the Court concludes that the question must be answered in the negative.

I.

Prewitt is an Alabama corporation with its principal place of business in Birmingham, Alabama. It purchases substantial quantities of gasoline for resale to the public at its gasoline stations. On April 4, 2000, Prewitt filed this action against OPEC, alleging that OPEC fixes prices and sets quotas for the crude oil produced by its member nations, and that OPEC's practices violate the antitrust laws of the United States.[1]

OPEC is an international organization formed in Baghdad, Iraq in 1960, and presently headquartered in Vienna, Austria. OPEC's current members are: Iraq, the Socialist Peoples Libyan Arab Jamahiriya, the Islamic Republic of Iran, Saudi Arabia, the United Arab Emirates, Qatar, Algeria, Nigeria, Indonesia, and Venezuela. None of OPEC's member nations are named in this action.[2] OPEC is here sued as an unincorporated association.

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[1] Plaintiff's law firm also filed an action against OPEC in the Superior Court of the District of Columbia, asserting claims under the local anti-trust laws of the District of Columbia and seventeen states. That action was dismissed on August 22, 2000. *Melnitchenko* v. *OPEC*, No. 000A3173 (D.C. Super. Ct.) Plaintiff filed a motion for reconsideration, which is still pending.

[2] The State of Kuwait, The United States Saudi Arabian Business Council, the Ministry of Petroleum and Mineral Resources For the Kingdom of Saudi Arabia, The Ministry of Middle East Institute, The American Business Association—Eastern Province, the Federal Republic of Nigeria, and the Ministry of Energy have been granted leave to file *amicus* briefs.

OPEC has moved to dismiss the action on a number of procedural and substantive grounds, including insufficiency of service of process. The resolution of the service of process issue makes it unnecessary to consider the other grounds of the Motion to Dismiss.

Service of Process

In its complaint, Prewitt specifically requested service on OPEC by registered mail. Accordingly, on April 6, 2002, the Clerk of the this Court sent to OPEC at its headquarters in Austria a copy of the summons and complaint via registered mail, return receipt requested.

The summons and complaint were delivered to OPEC's headquarters, and one of its employees signed the return receipt on April 17, 2000. On the same date, the summons and complaint were stamped "received" by OPEC's Administration and Human Resources Department ("HRD"). The HRD delivered the pleadings to Dr. Shokri Ghanem, Director of OPEC's research division. After consulting with Dolores Dobarro (a "legal officer"), Dr. Ghanem forwarded the documents to Dr. Lukman, then Secretary General for OPEC. Dr. Ghanem and Dr. Lukman ultimately decided that "the Secretariat should ignore the whole thing." (Doc. 80, Pl.'s Evid. Materials at Ex. 1, OPEC Bates # 00032, 15.)

Prewitt never sought the assistance of the Austrian Ministry for Foreign Affairs in effecting service on OPEC.

The Default Judgment and Injunction

OPEC failed to answer Prewitt's motion within the twenty-day period fixed by Fed.R.Civ.P. 12(a)(1)(A). The Clerk of the Court entered a default judgment against OPEC on May 19, 2000.

District Judge Sharon L. Blackburn, to whom this case was initially assigned, set aside the default judgment on September 15, 2000, questioning whether OPEC had been properly served with process.

The case was subsequently assigned to Senior District Judge Charles R. Weiner of the Eastern District of Pennsylvania, sitting by designation. On Prewitt's supplemental motion, the Court entered a second default judgment against OPEC and certified a class on December 11, 2002. The Court then ordered OPEC to appear at the Hugo L. Black Courthouse in Birmingham, Alabama, on March 8, 2001, and show cause why the relief sought by the Prewitt and the certified class should not be granted. A copy of the Show Cause Order was mailed to and received by OPEC at its headquarters. OPEC again failed to respond.

On March 22, 2001, the Court entered its Findings of Fact and Conclusions of Law. It found that OPEC was created and exists for the express purpose of controlling crude oil production and export; that there is a conspiracy between OPEC, its members, and non-OPEC members to fix and control crude oil prices; that OPEC's activities have a substantial and adverse impact on United States trade and commerce; that there is a daily impact of between $80 to $100 million in excess costs paid by United States consumers as a result of OPEC's actions; and that unless enjoined, the threat of continued injury from OPEC's restraints of trade would continue unabated. The Court concluded that it has subject matter jurisdiction under the Sherman and Clayton Acts; that OPEC is an "unincorporated association" within the meaning of Rule 17(b)(l) and thus may be sued in this Court; that it has *in personam* jurisdiction over OPEC because it was served with process by international registered mail and filed no response, and OPEC has the

requisite minimum contacts with the United States; and that the agreements coordinated and implemented by OPEC to fix and control the production and export of crude oil by its members are illegal *per se* under the Sherman and Clayton Acts.

Based on its Findings and Conclusions, the Court entered a Final Judgment and Order of Injunction (the "Injunction") against OPEC. It enjoined OPEC and those acting in concert and participation with OPEC, for a period of twelve months, from entering into any agreements to fix and control the production and export of crude oil, and from implementing and enforcing any agreements which do so. A copy of the Court's orders were delivered to the U.S. embassies for the foreign member countries.

Post-Judgment Relief

Unsurprisingly, the injunction captured OPEC's attention and apparently convinced it that the "whole thing" could no longer be ignored. On April 16, 2001, OPEC entered a special appearance and moved for post-judgment relief. OPEC's requested stay of enforcement of the judgment was granted.

Because of a conflict of interest, Judge Weiner recused himself from this case, and it was subsequently reassigned to the undersigned judge.

Thereafter, the default judgment and Final Judgment and Order of Injunction were vacated. The Court then requested briefs and heard arguments on the threshold issue of the validity of service of process. It is to this question that the Court now turns.

II.

The very concept of service of process stems from the due process clauses of the Fifth and Fourteenth amendments to the United States Constitution. Due process demands "notice reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (citing *Milliken v. Meyer*, 311 U.S. 457 (1940)).

The Supreme Court in *Murphy Brothers* recently emphasized the important role that formal service of process plays in the attainment of due process. Before the Court was question of whether the time to remove a state court action begins to run from informal receipt of the complaint or from official service of process. 526 U.S. 344. In addressing the question, the Supreme Court stated:

> We read Congress' provisions for removal in light of a bedrock principle: An individual or entity named as a defendant is not obliged to engage in litigation unless notified of the action, and brought under a court's authority, by formal process.

Id. at 347. So significant is the formality of notice, the Court held, that a party's time to remove a case cannot be triggered even by actual notice when there has not been proper service of official process.

Rule 4 of the Federal Rules of Civil Procedure describes the manner in which service of process must be made in order to subject the defendant to the jurisdiction of the court. Rule 4(h)(2) governs service on corporations and associations outside the United States. It generally states that service may be effected on an unin-

corporated association such as OPEC in any manner prescribed for individuals under Rule 4(f).[3]

Rule(f) (2) (C) (ii)provides:

> **(f) Service Upon Individuals in a Foreign Country.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed. . . may be effected in a place not within any judicial district of the United States:
>
> . . . .
>
> **(2)** if there is no internationally agreed means of service or the international agreements allows other means of service, provided that the service is reasonably calculated to give notice:
>
> . . . .
>
> **(C) unless prohibited by the law of the foreign country, by**
>
> . . . .
>
> **(ii)** any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; . . . .

(emphasis added).

Relevant Austrian Law

The establishment of OPEC's headquarters in Vienna is predicated on a "Headquarters Agreement" between

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[3] Specifically, the rule provides that service upon a foreign corporation or association in a place not within any judicial district of the United States shall be done "in any manner prescribed for individuals by subdivision (f) except personal delivery. . ." Fed.R.Civ.P. 4(h)(2).

the Republic of Austria and OPEC. Article 5(2) of the Headquarters Agreement provides that service of legal process upon OPEC "shall not take place within the headquarters seat except with the express consent of and under conditions approved by the Secretary General." The Headquarters Agreement is an integral part of Austrian law [4]

Additionally, the Austrian law on the Service of Legal Documents provides that the service of legal documents to foreign citizens or international organizations who are entitled to privileges and immunities shall be carried out with the assistance of the Federal Ministry for Foreign Affairs.

Standard for Dismissal under Rule 12(b)(5)

On a motion to dismiss for insufficiency of service under Rule 12(b)(5), the plaintiff bears the burden of establishing the validity of process. *Banco Latino, S.A.C.A. v. Gomez Lopez,* 53 F. Supp. 2d 1273, 1277 (S.D. Fla. 1999) (citing *Aetna Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc.,* 635 F.2d 434, 435 (5th Cir. 1981)). Prewitt thus bears the burden of establishing that process was served upon OPEC in a manner consistent with Rule 4(f)(2)(C)(ii).

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[4] Plaintiff argues that the Headquarters Agreement is a "special" law that falls outside the ambit of the phrase "the law of the foreign country" in Rule 4(f)(2)(C) and should not be "given effect by the Court" even if it falls within the boundaries of foreign "law" as intended by the Rule. Plaintiff fails, however, to provide the Court with any substantive support, for these claims. The only evidence on point is that the Headquarters Agreement was passed by the Austrian Parliament, and was published in the *Austrian Gazette*. Furthermore, on January 1, 2002, the Embassy of Austria sent a letter to this Court, in which it characterized the Headquarters Agreement as "an integral part of Austrian law."

III.

Until recently, the question of the validity of process served by mail upon an individual in a foreign country was an area of ambiguity for the courts. Up until 1993, the manner of service upon an individual in a foreign nation was prescribed by Rule 4(i)(1)(D), which provided for service, "by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served." Without explicit congressional direction to the contrary, courts were left to determine whether service was adequate where it complied with American norms of fairness, but did not comport with the methods prescribed as appropriate by the foreign national. Though courts inevitably differed in their approaches to the issue, most courts in the United States permitted use of the service methods even if such methods violated the law of the country in which service was effected. *See e.g., SEC v. International Swiss Investment Corp.*, 895 F.2d 1272 (9th Cir. 1990); *Bersch v. Drexel Firestone, Inc.*, 389 F. Supp. 446 (S.D.N.Y. 1974), modified, 519 F.2d 974 (2d Cir. 1975); *ALCO Standard Corp. v. Benalal*, 345 F. Supp. 14 (E.D. Pa. 1972).[5]

In the wake of diplomatic protest and conflicting court rulings, Congress amended Rule 4 in 1993. Among the changes was a clarification of Rule 4(i) through the addition of a requirement that service under the methods of the previous section (i) not be made in violation of foreign law. The replacement rule was designated as

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[5] A few lower court decisions indicated that service in violation of foreign law would not be valid for the purposes of domestic law. *See, e.g., Aries Ventures Ltd. v. AXA Finance S.A.*, 729 F. Supp. 289 (S.D.N.Y. 1990); *R.M.B. Electrostat, Inc. v. Lectra Trading AG*, 1983 WL 13711 (E.D. Pa. Jan. 20, 1983).

"Rule 4(f)." As noted earlier, it authorizes service by mail on a foreign unincorporated association unless "prohibited" by the law of the foreign country in which service is sought to be effected.

This Court recognizes that ambiguities exist even under the revised Rule 4(f). A number of courts have already undertaken to divine, with differing results, the draftspersons' intended meaning of the word "prohibited" in Rule 4(f)(2)(C)(ii).[6] Additionally, the Court rec-

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[6] Plaintiff argues that the "prohibited by" clause of Rule 4(f)(2)(C)(ii) refers only to means of service **expressly disallowed** by the law of the foreign national and that Plaintiff's method of service must be deemed valid because there is no Austrian law declaring the method invalid. Conversely, Defendant interprets the "prohibited by" clause of the Rule as referring to all means of service not **expressly allowed** by the law of the foreign national. Defendant argues that Plaintiff's method of service must be deemed invalid because there is no Austrian law declaring that service by mail may be used.

The question of the intended meaning of the "prohibited by" clause has been considered by a number of courts. Though a few courts have adopted the approach employed by Defendant, *see, e.g., Proctor & Gamble Cellulose Co. v. Viskova-Loznica,* 33 F. Supp.2d 644, 664-65 (W.D. Tenn. 1998); *Graval v. P.T. Bakrie & Bros., P.T.*, 986 F. Supp. 1326 (C.D. Cal 1996), courts have more commonly interpreted the clause in the manner suggested here by Plaintiff. *See Dee-K Enterprises, Inc. v. Heveafil SDN, BHD,* 174 F.R.D. 376 (E.D. Va. 1997); *see also Emery v. Wood Industries, Inc.*, 2001 WL 951579, at *2 (D.N.H. Aug. 20, 2001); *Carnigal v. Kartria Shipping, Ltd.*, 2000 WL 1036224, at *2 (E.D. La. July 25, 2000); *Banco Latino S.A.C.A. v. Gomez Lopez,* 53 F. Supp. 1273, 1277 (S.D. Fla. 1999); *Resource Ventures, Inc. v. Resources Management Int'l, Inc.*, 42 F. Supp.2d 423 (D. Del. 1999). Courts that have read the clause in this manner have rested their analysis on the idea that this is the only reading that gives subsection (f)(2)(C) operative effect. Were subsection (f)(2)(C) inapplicable where a form of return receipt mail is simply not prescribed by the laws of a foreign country, the subsection would be superfluous to subsection (f)(2)(A), which allows service in a foreign country in any matter "prescribed" by the law of that country.

Given that the Court finds statutory language expressly prohibiting the method of service employed by Prewitt, this finding is not dispositive of

ognizes that there may be cases in which the correct interpretation of foreign law is problematic. However, this case falls into neither of these categories. Even assuming that the draftspersons intended the term "prohibited" to require clear statutory language by the legislative body of the foreign national, this case reflects an example of such clear language.

The Austrian government, as a sovereign, has declared expressly—through both its legislative and treaty-making powers—that certified mail service directly upon OPEC is prohibited. Thus, there is no plausible basis for Prewitt's argument that the Headquarters Agreement is not a "part" of Austrian law. Not only have Austrian government officials declared the Agreement to be

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the case at bar, and the Court, therefore, need not issue a final ruling on it. However, based on the evidence before the Court, the Court is inclined to interpret the "prohibited by" clause in a way not argued by either party.

While Plaintiff and courts, such as *Dee-K*, correctly point out that reading the clause as prohibiting all that is not expressly allowed under local law is to deem the clause inoperative, the logical result of a determination that **some** nonprescribed means of service must be **potentially** allowable is not that **all** non-prescribed means are **actually** allowable. Rather, the Court is of the opinion that there are likely, in many nations, some non-prescribed methods of service that are judicially valid and some that are judicially invalid. Validity of a given method of service depends on whether or not the method complies with the judicial norms established by the foreign national itself. Indeed, this is an interpretation that most naturally applies to an analysis of the validity of a means of service employed in the United States. While there is no American law disallowing skywriting as a means of serving process, this is most assuredly a method of service that would be deemed unacceptable in any court. At the same time, methods such as service via facsimile are often deemed acceptable by courts despite the fact that there are no laws expressly allowing such means. *See, e.g., Wilkens v. Johnson*, 238 F. 3d 328 (5th Cir. 2001); *In re Town of Amenia*, 200 F.R.D. 200 (S.D.N.Y. 2001); *In re International Telemedia Associates, Inc.*, 245 B.R. 713 (Bankr. N.D. Ga. 2000).

legally binding, but **the Headquarters Agreement was actually enacted into law by the Austrian Parliament.**

The Court therefore concludes that OPEC was not effectively served even though it actually received the summons and complaint, as unconsented to service by registered mail on OPEC is prohibited by Austrian law.

IV.

Economic globalization has fostered increasingly global litigation. As travel has become easier, and the prospect of production, assembly, distribution, and marketing each taking place in a different nation commonplace, the number of potential dispute-resolving fora and the rules that regulate these fora have multiplied rapidly. However, while international economic barriers are falling, political barriers remain. The world is one of separate sovereigns with distinct norms and rules, each mandating courtesy and periodic deference. Though the rapidity and frequency with which this eco-political tension has arisen has often left courts attempting to navigate complex questions of policy, such questions are properly reserved only for the Legislature.

The notion of wholly insulating from service of process an entity such as OPEC—whose decisions surely affect the daily lives of most Americans—is, for many, a bitter pill to swallow. But the Court must apply the rules as they are written. The rules reflect a clearly expressed diplomatic policy choice of Congress to respect the normative and, ultimately, the legislative, decisions of foreign sovereigns.

By separate order, Defendant's Motion to Dismiss shall be granted, without prejudice, to the right of Plaintiff to pursue an alternate means of effecting service on Defendant.

Done this 2nd day of August, 2002.

U. W. Clemon
Chief United States District Judge
U. W. Clemon

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 00-C-0865-S
FILED March 4, 2003

PREWITT ENTERPRISES, Inc., on its own behalf and on behalf of all others similarly situated,

Plaintiff,

—VS.—

ORGANIZATION OF THE PETROLEUM EXPORTING COMPANIES,

Defendant.

ORDER DENYING MOTION FOR ALTERNATIVE SERVICE OF PROCESS OR AMENDMENT OF THE JUDGMENT

Because of the Court's view that the Defendant cannot in this case be effectively served with process, Plaintiff's Motion For Alternative Service of Process, or, in the alternative, its Motion to Amend the Judgment is hereby DENIED.

Done this 4th day of March, 2003.

U. W. Clemon
Chief United States District Judge
U. W. Clemon

USCS Fed Rules Civ Proc R 4

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*** CURRENT THROUGH CHANGES RECEIVED APRIL, 2004 ***

FEDERAL RULES OF CIVIL PROCEDURE
II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

USCS Fed Rules Civ Proc R 4 (2004)

Rule 4. Summons

(f) Service Upon Individuals in a Foreign Country. Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

HEADQUARTERS AGREEMENT

BETWEEN

THE REPUBLIC OF AUSTRIA

AND

OPEC

Effective 10th June 1974

WITH AMENDMENTS

effective 1st October 1985

AGREEMENT

BETWEEN THE ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES AND THE REPUBLIC OF AUSTRIA REGARDING THE HEADQUARTERS OF THE ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES

The Organization of the Petroleum Exporting Countries and the Republic of Austria, desiring to conclude a new agreement regarding the seat of the Organization of the Petroleum Exporting Countries in the City of Vienna and to regulate questions connected therewith, have agreed as follows:

ARTICLE I

When used in this Agreement,

(a) "OPEC" means the Organization of the Petroleum Exporting Countries;

(b) "The Government" means the Federal Government of the Republic of Austria;

(c) "Secretary General" means the Secretary General of OPEC or any officer designated to act on his behalf;

(d) "Member Country" means a State which is a Member of OPEC;

(e) "Governor" means a member of the Board of Governors of OPEC, as defined in the Statute of OPEC;

(f) "Representatives of Member Countries" means accredited representatives of Member Countries and members of their delegations, but does not include administrative and technical or other auxiliary staff;

(g) "Meeting convened by OPEC" means any meeting of the Conference of OPEC or of the Board of Governors of OPEC, or any international conferences or other gatherings convened by OPEC or under its sponsorship;

(h) "Archives of OPEC" means records and correspondence, documents, manuscripts, still and moving pictures, films and sound recordings belonging to or held by OPEC;

(i) "Officials of OPEC" means the Secretary General and all members of the staff of OPEC, except those who are locally recruited and assigned to hourly rates;

(j) "Property" means all property, including Funds and other assets, belonging to OPEC or held or administrated by OPEC in furtherance of its statutory functions and all income of OPEC; and

(k) "Headquarters" means the headquarters area with the building or buildings upon it, as defined in a supplemental agreement between OPEC and the Government, and the Secretary General's Residence, and, as the case may be, any other land or building which may from time to time be included, temporarily or permanently, therein in accordance with the provisions of Article 2(2).

ARTICLE 2

(1) The permanent headquarters of OPEC, as approved by Resolution of the Conference of OPEC and as defined in the supplemental agreement between OPEC and the Government referred to in Article 1(k), shall be in the headquarters seat.

(2) Any building outside the headquarters seat which is used with the concurrence of the Government for meetings convened by OPEC shall be temporarily included in the headquarters seat.

ARTICLE 3

(1) The Government recognizes the extraterritoriality of the headquarters seat, which shall be under the control and authority of OPEC as provided in this Agreement.

(2) Except as otherwise provided in this Agreement and subject to any regulation enacted under Article 4, the laws of the Republic of Austria shall apply within the headquarters seat.

(3) Except as otherwise provided in this Agreement, the courts or other appropriate organs of the Republic of Austria shall have jurisdiction, as provided in applicable laws, over acts done and transactions taking place in the headquarters seat.

ARTICLE 4

(1) OPEC shall have the power to make regulations, operative within the headquarters seat, for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No law of the Republic of Austria which is inconsistent with a regulation of OPEC authorized by this article shall, to the extent of such inconsistency, be applicable within the headquarters seat. Any dispute between OPEC and the Republic of Austria as to whether a regulation of OPEC is authorized by this article or as to whether a law of the Republic of Austria is inconsistent with any reg-

ulation of OPEC authorized by this article, shall be promptly settled by the procedure set out in Article 29. Pending such settlement, the regulation of OPEC shall apply and the law of the Republic of Austria shall be inapplicable in the headquarters seat to the extent that OPEC claims it tobe inconsistent with the regulation of OPEC.

(2) OPEC shall from time to time inform the Government, as may be appropriate, of regulations made by it in accordance with paragraph (1).

(3) This article shall not prevent the reasonable application of fire protection or sanitary regulations of the appropriate Austrian authorities.

ARTICLE 5

(1) The headquarters seat shall be inviolable. No officer or official of the Republic of Austria, or other person exercising any public authority within the Republic of Austria, shall enter the headquarters seat to perform any duties therein except with the consent of, and under conditions approved by, the Secretary General. The consent of the Secretary General may, however, be assumed in case of fire or other disaster requiring prompt protective action.

(2) The service of legal process, including the seizure of private property, shall not take place within the headquarters seat except with the express consent of, and under conditions approved by, the Secretary General.

ARTICLE 6

(1) The appropriate Austrian authorities shall exercise due diligence to ensure that the tranquillity of the headquarters seat is not disturbed by any person or group of persons attempting unauthorized entry into or creating disturbances in the immediate vicinity of the headquarters seat, and shall provide on the boundaries of the headquarters seat such police protection as may be required for these purposes.

(2) If so requested by the Secretary General, the appropriate Austrian authorities shall provide a sufficient number of police for the preservation of law and order in the headquarters seat.

(3) The appropriate Austrian authorities shall take all reasonable steps to ensure that the amenities of the headquarters seat are not prejudiced and that the purposes for which the headquarters seat is required are not obstructed by any use made of the land or buildings in the vicinity of the headquarters seat. OPEC shall take all reasonable steps to ensure that the amenities of the land in the vicinity of the headquarters seat are not prejudiced by any use made of the land or buildings in the headquarters seat.

ARTICLE 7

The Government recognizes the juridical personality of OPEC and, in particular, its capacity:

(a) To contract;

(b) To acquire and dispose of movable and immovable property; and

(c) To institute legal proceedings.

ARTICLE 8

The Government recognizes the right of OPEC to convene meetings within the headquarters seat or, with the concurrence of the Government, elsewhere in the Republic of Austria.

ARTICLE 9

OPEC and its property, wherever located and by whomsoever held, shall enjoy immunity from every form of legal process except insofar as in any particular case OPEC shall have expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

ARTICLE 10

The property of OPEC, wherever located and by whomsoever held, shall enjoy immunity from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

ARTICLE 11

The archives of OPEC shall be inviolable wherever located.

ARTICLE 12

(1) OPEC, its assets, income and other property shall be exempt from all forms of taxation, provided, however, that such tax exemption shall not extend to the owner or lessor of any property rented by OPEC.

(2) Insofar as the Government, for important administrative considerations, may be unable to grant to OPEC exemption from indirect taxes which constitute part of the cost of goods purchased by or services rendered to OPEC, including rentals, the Government shall reimburse OPEC for such taxes by the payment, from time to time, of lump sums to be agreed upon by OPEC and the Government. It is, however, understood that OPEC will not claim reimbursement with respect to minor purchases. With respect to such taxes, OPEC shall at all times enjoy at least the same exemptions and facilities as are granted to Austrian governmental administrations or to chiefs of diplomatic missions accredited to the Republic of Austria, whichever are the more favourable. It is further understood that OPEC will not claim exemptions from taxes which are in fact no more than charges for public utility services.

(3) All transactions to which OPEC is a party, and all documents recording such transactions, shall be exempt from all taxes, recording fees, and documentary taxes.

(4) Articles imported or exported by OPEC for official purposes shall be exempt from customs duties and other levies, and from prohibitions and restrictions on imports and exports.

(5) OPEC shall be exempt from customs duties and other levies, prohibitions and restrictions on the importation of service automobiles, and spare parts thereof, required for its official purposes.

(6) The Government shall, if requested, grant allotments of gasoline or other fuels and lubricating oils for each such automobile operated by OPEC in such

quantities as are required for its work and at such special rates as may be established for diplomatic missions in the Republic of Austria.

(7) Articles imported in accordance with paragraphs (4) and (5) or obtained from the Government in accordance with paragraph (6) of this article, shall not be sold by OPEC in the Republic of Austria within two years of their importation or acquisition, unless otherwise agreed upon by the Government.

ARTICLE 13

OPEC shall enjoy, as far as may be compatible with any international conventions, regulations and arrangements to which the Government is a party, for its official communications, treatment not less favourable than that accorded by the Government to any other organization or government, including diplomatic missions of such other government, in the matter of priorities and rates for mails, cables, telegrams, radiograms, telephotos, television, telephone and other communications, and press rates for information to press and radio.

ARTICLE 14

(1) All official communications directed to OPEC, or to any of its officials at the headquarters seat, and all outward official communications of OPEC, by whatever means or in whatever form transmitted, shall be immune from censorship and from any other form of interception or interference with their privacy.

(2) OPEC shall have the right to use codes and to dispatch and receive correspondence and other official communications by courier or, in sealed bags, which

shall have the same privileges and immunities as diplomatic couriers and bags.

ARTICLE 15

(1) Without being subject to any controls or regulations of any kind, OPEC may freely for official purposes:

(a) Purchase any currencies through authorized channels and hold and dispose of them;

(b) Operate accounts in any currency;

(c) Purchase through authorized channels, hold and dispose of funds and securities; and

(d) Transfer its funds, securities and currencies to or from the Republic of Austria, to or from any other country, or within the Republic of Austria.

(2) The provisions of paragraph (1) shall not apply to amounts in Austrian currency, which are subject to the Austrian regulations concerning blocked accounts, nor shall they affect any international payments agreements of the Republic of Austria, which are in force.

ARTICLE 16

Any pension fund or provident fund established by or conducted under the authority of OPEC shall enjoy legal capacity in the Republic of Austria if OPEC so requests, and shall enjoy the same exemptions, immunities and privileges as OPEC itself.

ARTICLE 17

OPEC shall be exempt from all compulsory contributions to, and officials of OPEC shall not be required by the Government to participate in, any social security scheme of the Republic of Austria.

ARTICLE 18

The Government shall make such provision as may be necessary to enable any official of OPEC who is not afforded social security coverage by OPEC to participate, if OPEC so requests, in any social security scheme of the Republic of Austria. OPEC shall, insofar as possible, arrange, under conditions to be agreed upon, for the participation in the Austrian social security system of those locally recruited or temporarily employed members of its staff to whom it does not grant social security protection at least equivalent to that offered under Austrian law.

ARTICLE 19

(1) The Government shall take all necessary measures to facilitate the entry into, and sojourn in Austrian territory and shall place no impediment in the way of the departure from Austrian territory of the persons listed below, shall ensure that no impediment is placed in the way of their transit to or from the headquarters seat and shall afford them any necessary protection in transit:

(a) Representatives of Member Countries and their families;

(b) Governors and their families;

(c) Officials of OPEC, their families and other members of their households;

(d) Persons, other than officials of OPEC, performing missions authorized by OPEC or serving on specialized organs of OPEC, working parties or other subsidiary bodies of OPEC, and their spouses;

(e) Representatives of States which are not Members of OPEC who are sent as observers, in accordance with rules adopted by OPEC, to meetings convened by OPEC; and

(f) Representatives of other organizations or other persons invited by OPEC to the headquarters seat on official business.

(2) Visas which may be required by persons referred to in this article shall be granted without charge as promptly as possible.

ARTICLE 20

Representatives of Member Countries, Governors and representatives of States which are not Members of OPEC who are sent as observers, in accordance with rules adopted by OPEC to meetings convened by OPEC shall, without prejudice to any other privileges and immunities which they may enjoy while exercising their functions and during their journeys to and from the headquarters seat, enjoy within and with respect to the Republic of Austria, the following privileges and immunities:

(a) Immunity in respect of themselves, their spouses and dependent children from personal arrest or detention and from seizure of their personal baggage;

(b) Immunity from legal process of any kind in respect of words spoken or written, and of all acts done by them in the performance of their official function, such immunity to continue notwithstanding that the persons may no longer be engaged in the performance of such functions;

(c) Inviolability of all papers and documents;

(d) The right to use codes and to dispatch or receive papers and correspondence by courier or in sealed bags;

(e) Exemption, in respect of themselves, their spouses and dependent children from immigration restrictions, alien registration and national service obligations;

(f) The same privileges with respect to currency and exchange restrictions as the Government accords to representatives of foreign Governments on temporary official missions; and

(g) The same immunities and facilities with respect to their personal and official baggage as the Government accords to members, having comparable rank, of diplomatic missions in the Republic of Austria.

ARTICLE 21

The privileges and immunities accorded by Article 20 are conferred, not for the personal benefit of the individuals themselves, but in order to safeguard the independent exercise of their functions in connection with OPEC. Consequently, it is incumbent upon a Member Country as well as upon any State sending observers to waive the immunity of any of its representatives or of the Governor nominated by the respective State, in any

case where, in the judgement of the Member Country, the immunity would impede the course of justice and where it can be waived without prejudice to the purpose for which it was accorded.

ARTICLE 22

Officials of OPEC shall enjoy within and with respect to the Republic of Austria the following privileges and immunities:

(a) Immunity from legal process of any kind in respect of words spoken or written, and of acts performed by them, in their official capacity; such immunity to continue notwithstanding that the persons concerned may have ceased to be officials of OPEC;

(b) Immunity from seizure of their personal and official baggage;

(c) Immunity from inspection of official baggage, and, if the official comes within the scope of Article 23, immunity from inspection of personal baggage;

(d) Exemption from taxation in respect of the salaries, emoluments, indemnities and pensions paid to them by OPEC for services past or present or in connection with their service with OPEC;

(e) Exemption from any form of taxation on income derived by them from sources outside the Republic of Austria;

(f) Exemption, with respect to themselves, their spouses, their dependent relatives and other members of their households from immigration restrictions and alien registration;

(g) Freedom to acquire or maintain within the Republic of Austria or elsewhere foreign securities, foreign currency accounts, and other movable and under the same conditions applicable to Austrian nationals immovable property; and at the termination of their OPEC employment, the right to take out of the Republic of Austria through authorized channels without prohibition, or restriction, their funds in the same currency and up to the same amounts as they had brought into the Republic of Austria;

(h) The same protection and repatriation facilities with respect to themselves, their spouses, their dependent relatives and other members of their households as the Government accords in time of international crisis to members, having comparable rank, of diplomatic missions in the Republic of Austria; and

(i) The right to import for personal use, free of duty and other levies, prohibitions and restrictions on imports:

(i) Their furniture and effects in one or more separate shipments and thereafter to import necessary additions to the same;

(ii) At the a time of first installation two cars; however, customs duties are to be paid if they are sold in the Republic of Austria within a period of two years, the lapse of time being counted from the date of importation;

(iii) Limited quantities of certain articles for personal use or consumption and not for gift or sale; OPEC shall enjoy the right to establish a commissary of its own or its officials shall have access to one of the existing commissaries in

Vienna; a supplemental agreement shall be concluded to regulate the exercise of these rights.

ARTICLE 23

In addition to the privileges and immunities specified in Article 22:

(a) The Secretary General shall be accorded in respect of himself, his spouse and his dependent children, the privileges and immunities, exemptions and facilities accorded to ambassadors who are chiefs of missions;

(b) The Deputy Secretary General, the Chiefs of the Departments, Senior Officers and such additional categories of officials as may be designated, in agreement with the Government, by the Secretary General on the ground of the responsibilities of their positions in OPEC the same privileges and immunities, exemption and facilities as the Government accords to members, having comparable rank, of diplomatic missions in the Republic of Austria.

ARTICLE 24

(1) Persons, other than officials of OPEC, performing missions authorized by OPEC or serving on specialized organs of OPEC, working parties or other subsidiary bodies of OPEC and representatives of other organizations or other persons invited by OPEC to the headquarters seat on official business shall, without prejudice to any other privileges and immunities which they may enjoy for other reasons, enjoy immunity from legal process of any kind in respect of words spoken or written, and of acts per-

formed by them in direct connection with their official business.

(2) They shall further enjoy the same protection and repatriation facilities with respect to themselves, their spouses, their dependent relatives and other members of their households as the Government accords in time of international crises to members, having comparable rank, of diplomatic missions in the Republic of Austria.

(3) Where the incidence of any form of taxation depends upon residence, periods during which the persons referred to in paragraph (1) may be present in the Republic of Austria for the discharge of their duties shall not be considered as periods of residence.

ARTICLE 25

(1) The privileges and immunities accorded by Articles 22, 23 and 24 are conferred in the interest of OPEC and not for the personal benefit of the individuals themselves. Consequently, it is incumbent upon the Organization to waive the immunity of any of its officials or of any person covered by the provision of Article 24 in all cases where the immunity impedes the course of justice and where it can be waived without prejudice to the interest of OPEC. In any case where these privileges and immunities arise, the official or other person involved shall immediately report to the Secretary General, who shall decide, in consultation, where appropriate, with the Board of Governors, whether they shall be waived. In the case of the Secretary General, the Conference of OPEC shall have the right to waive immunities.

(2) OPEC and its officials shall co-operate at all times with the appropriate Austrian authorities to facilitate the prompt execution of the laws of the Republic of Austria and to prevent the occurrences of any abuses in connection with the privileges and immunities accorded by this Agreement.

ARTICLE 26

All persons of Austrian citizenship and all stateless persons resident in Austria and employed by OPEC shall enjoy the privileges and immunities, exemptions and facilities accorded by this Agreement to the extent recognized by international law as accepted by the Government, provided, however, that Article 17 shall not and Article 22(d) shall, in any event, apply to officials of OPEC who are Austrian citizens or who are stateless persons resident in Austria. They shall also have access to the commissary established in accordance with Article 22 paragraph (i) sub-paragraph (iii), the exercise of this right being regulated by the supplemental agreement provided for in that sub-paragraph.

ARTICLE 27

(1) OPEC shall communicate to the Government a list of persons within the scope of Articles 20, 22 and 24 and shall revise such list from time to time as may be necessary.

(2) The Government shall furnish persons within the scope of Article 22 with an identity card bearing the photograph of the holder. This card shall serve to identify the holder in relation to all Austrian authorities.

ARTICLE 28

The Secretary General shall take every precaution to ensure that no abuse of a privilege or immunity conferred by this Agreement shall occur. Should the Government consider that abuse of a privilege or immunity conferred by this Agreement has occurred, the Secretary General shall upon request, consult with the Federal Minister for Foreign Affairs of the Republic of Austria to determine whether any such abuse has occurred. If such consultations fail to achieve within a reasonable time a result satisfactory to the Secretary General and to the Government, the matter may be referred by either party for final decision to a tribunal of three arbitrators: one to be chosen by the Secretary General, one to be chosen by the Federal Minister for Foreign Affairs of the Republic of Austria and the third, who shall be chairman of the tribunal, to be chosen by the first two arbitrators. If the tribunal is not constituted within three months from the date of the request made for the submission of the dispute to arbitration, the appointment of the arbitrators not yet designated shall be made by the President of the International Court of Justice at the request of OPEC or the Government.

ARTICLE 29

Any dispute which may arise between OPEC and the Government as to the interpretation or application of this Agreement, shall, at the request of either of them, be referred to arbitration. The arbitration tribunal shall consist of three arbitrators: one to be chosen by the Secretary General, one to be chosen by the Federal Minister for Foreign Affairs of the Republic of Austria and the third, who shall be chairman of the tribunal, to be chosen by the first two arbitrators. If the tribunal is not con-

stituted within six months from the date of the request made for the submission of the dispute to arbitration, the appointment of the arbitrators not yet designated shall be made by the President of the International Court of Justice at the request of OPEC or the Government.

ARTICLE 30

(1) This Agreement shall enter into force upon an exchange of notes between the Secretary General duly authorized thereto by Resolution of the Conference of OPEC and the Federal Minister for Foreign Affairs of the Republic of Austria.

(2) Upon the entry into force of this Agreement the "Agreement between the Organization of the Petroleum Exporting Countries and the Republic of Austria regarding the Headquarters of the Organization of the Petroleum Exporting Countries" of 24th June 1965, ceases to be in force.

(3) Consultations with respect to modification of this Agreement shall be entered into at the request of OPEC or the Government. Any such modification shall be by mutual consent.

(4) This Agreement shall be construed in the light of its primary purpose of enabling OPEC at its headquarters in the Republic of Austria fully and efficiently to discharge its responsibilities and fulfil its purposes.

IN WITNESS THEREOF, the respective representatives of the Organization of the Petroleum Exporting Countries and the Republic of Austria have signed this Agreement.

DONE in duplicate in Vienna, this day of 18th February of 1974, in the English and German languages, both texts being equally authoritative.

For the Organization of the Petroleum Exporting Countries	For the Republic of Austria
(signed)	(signed)
Dr A. Khene	Rudolf Kirchschläger

The Federal Minister
for Foreign Affairs

Vienna, 18th February 1974

Excellency,

With reference to the Agreement between the Organization of the Petroleum Exporting Countries and the Republic of Austria regarding the Headquarters of the Organization of the Petroleum Exporting Countries, to which I have this day affixed my signature, I have the honour to propose that:

(1) The articles mentioned in paragraph (7) of Article 12 of the Agreement may be disposed of without charge only for the benefit of international organizations or charitable institutions;

(2) Having regard to Article 38(1) of the Vienna Convention on Diplomatic Relations and to the practice of Austria, the Republic of Austria will accord persons referred to in Article 26 of the Agreement—persons of Austrian citizenship and stateless persons resident in Austria—only the immunity from legal process of any kind in respect of words spoken or written, and of acts performed by them in direct connection with their official business;

(3) In accordance with the practice of the Republic of Austria which is in conformity with Article 42 of the Vienna Convention on Diplomatic Relations to which Austria is a party, diplomatic agents accredited to the Republic of Austria may not practise for personal profit any professional or commercial activity. It is understood that the same restriction shall apply to all persons to whom the Agreement accords the same privileges and immunities as are

accorded to members, having comparable rank, of diplomatic missions in the Republic of Austria;

(4) Persons to whom the Agreement applies, who are not Austrian nationals or stateless persons resident in Austria, shall not benefit from Austrian regulations governing family and maternity allowances;

(5) Without prejudice to the provision of Article 22(g) of the Agreement, officials of OPEC and persons, other than officials of OPEC, performing missions authorized by OPEC or serving on specialized organs of OPEC, working parties or other subsidiary bodies of OPEC shall be allowed, over and above the facilities granted by the Agreement, to make transfers to other countries up to a maximum amount of one thousand US dollars (US$1,000.00) per year, to the debit of accounts in Austrian Schilings held in their names at Austrian credit institutions; if the aforementioned persons wish to make Austrian currency transfers exceeding the amount mentioned above, such transfers shall be authorized by the Austrian authorities up to the amount of all salary previously received in Austrian currency by the person concerned from OPEC, provided that OPEC agrees that the amount to be transferred shall be deducted from transferable Austrian currency balances of OPEC.

If OPEC agrees to this proposal, I have the honour to propose that this note and your note of confirmation shall constitute an Agreement between OPEC and the Republic of Austria, entering into force on the same day as the Headquarters Agreement.

Accept, Excellency, the assurances of my highest consideration.

(signed)

Rudolf Kirchschläger

His Excellency
Dr. Abderrahman Khene
Secretary General of the
Organization of the Petroleum
Exporting Countries
Vienna

Organization of the Petroleum
Exporting Countries

Secretary General Vienna, 18th February 1974

Excellency,

I have the honour to acknowledge receipt of your note of 18th February 1974, which reads as follows:

"With reference to the Agreement between the Organization of the Petroleum Exporting Countries and the Republic of Austria regarding the Headquarters of the Organization of the Petroleum Exporting Countries, to which I have this day affixed my signature, I have the honour to propose that:

(1) The articles mentioned in paragraph (7) of Article 12 of the Agreement may be disposed of without charge only for the benefit of international organizations or charitable institutions;

(2) Having regard to Article 38(1) of the Vienna Convention on Diplomatic Relations and to the practice of Austria, the Republic of Austria will accord persons referred to in Article 26 of the Agreement— persons of Austrian citizenship and stateless persons resident in Austria — only the immunity from legal process of any kind in respect of words spoken or written, and of acts performed by them in direct connection with their official business;

(3) In accordance with the practice of the Republic of Austria which is in conformity with Article 42 of the Vienna Convention on Diplomatic Relations to which Austria is a party, diplomatic agents accredited to the Republic of Austria may not practice for

personal profit any professional or commercial activity. It is understood that the same restriction shall apply to all persons to whom the Agreement accords the same privileges and immunities as are accorded to members, having comparable rank, of diplomatic missions in the Republic of Austria;

(4) Persons to whom the Agreement applies, who are not Austrian nationals or stateless persons resident in Austria, shall not benefit from Austrian regulations governing family and maternity allowances;

(5) Without prejudice to the provision of Article 22(g) of the Agreement, officials of OPEC and persons, other than officials of OPEC, performing missions authorized by OPEC or serving on specialized organs of OPEC, working parties or other subsidiary bodies of OPEC shall be allowed, over and above the facilities granted by the Agreement, to make transfers to other countries up to a maximum amount of one thousand US dollars (US$1,000.00) per year, to the debit of accounts in Austrian Schillings held in their names at Austrian credit institutions; if the aforementioned persons wish to make Austrian currency transfers exceeding the amount mentioned above, such transfers shall be authorized by the Austrian authorities up to the amount of all salary previously received in Austrian currency by the person concerned from OPEC, provided that OPEC agrees that the amount to be transferred shall be deducted from transferable Austrian currency balances of OPEC.

If OPEC agrees to this proposal, I have the honour to propose that this note and your note of confirmation shall constitute an Agreement between OPEC and the

Republic of Austria, entering into force on the same day as the Headquarters Agreement."

I have the honour to confirm that OPEC agrees with the above proposal and that your note and this reply will constitute an Agreement between OPEC and the Republic of Austria, entering into force on the same day as the Headquarters Agreement.

Accept, Excellency, the assurances of my highest consideration.

(signed)

Dr. Adberrahman Khene
(Secretary General)

His Excellency
Dr. Rudolf Kirchschläger
Federal Minister for Foreign Affairs
Vienna

Exchange of Notes between the Republic of Austria and the Organization of the Petroleum Exporting Countries concerning the amendment to the Agreement between the Republic of Austria and the Organization of the Petroleum Exporting Countries regarding the Headquarters of the Organization of the Petroleum Exporting Countries

Organization
of the Petroleum Exporting Countries
Obere Donaustrasse 93
1020 Vienna II, Austria

Vienna, 8th February 1985

Excellency,

I have the honour to propose that the Agreement between the Organization of the Petroleum Exporting Countries (hereinafter referred to as 'OPEC') and the Republic of Anstria regarding the Headquarters of OPEC (hereinafter referred to as 'Headquarters Agreement') shall be amended as follows:

I. Sub-paragraph (ii) of paragraph (i) of Article 22 of the Headquarters Agreement shall read:

'One automobile every four years'.

II. Without prejudice to the provisions of the Headquarters Agreement the following additional privileges shall be granted to officials of OPEC and members of their families forming part of their households, provided they are not Austrian nationals or stateless persons permanently resident in Austria:

(1) Exemption from taxation on all income and property of officials and members of their fam-

ilies forming part of their households, insofar as such income and property do not come under the limited tax liability of the Austrian legislation on taxation of income or property.

(2) Exemption from inheritance and gift taxes, insofar as such arise solely from the fact that the officials and members of their households reside or maintain their usual domicile in Austria.

III. If and to the extent that the Republic of Austria shall enter into any agreement with any inter-governmental organization containing terms or conditions more favourable to that organization than similar terms or conditions of the Headquarters Agreement, the Republic of Austria shall extend such more favourable terms or conditions to OPEC by means of a supplemental agreement.

If the Republic of Austria agrees to this proposal, I have the honour to propose that this Note and your Note of confirmation shall constitute an Agreement between OPEC and the Republic of Austria amending the Headquarters Agreement which shall enter into force on the first day of the third month following the day the Government of the Republic of Austria has notified OPEC that the necessary constitutional requirements for its entry into force have been met.

Accept, Excellency, the assurances of my highest consideration.

(signed)

Fadhil J. Al-Chalabi (Dr)
Deputy Secretary General
Acting for the Secretary General

His Excellency
Leopold Gratz
Federal Minister of Foreign Affairs
Vienna

The Federal Minister
for Foreign Affairs

Vienna, 8th February 1985

Excellency,

I have the honour to acknowledge receipt of your note of 8th February 1985, which reads as follows:

"I have the honour to propose that the Agreement between the Organization of the Petroleum Exporting Countries (hereinafter referred to as 'OPEC') and the Republic of Austria regarding the Headquarters of OPEC (hereinafter referred to as 'Headquarters Agreement') shall be amended as follows:

I. Sub-paragraph (ii) of paragraph (i) of Article 22 of the Headquarters Agreement shall read:

'One automobile every four years'.

II. Without prejudice to the provisions of the Headquarters Agreement the following additional privileges shall be granted to officials of OPEC and members of their families forming part of their households, provided they are not Austrian nationals or stateless persons permanently resident in Austria:

(1) Exemption from taxation on all income and property of officials and members of their families forming part of their households, insofar as such income and property do not come under the limited tax liability of the Austrian legislation on taxation of income or property.

(2) Exemption from inheritance and gift taxes, insofar as such arise solely from the fact that the officials and members of their households reside or maintain their usual domicile in Austria.

III. If and to the extent that the Republic of Austria shall enter into any agreement with any inter-governmental organization containing terms or conditions more favourable to that organization than similar terms or conditions of the Headquarters Agreement, the Republic of Austria shall extend such more favourable terms or conditions to OPEC by means of a supplemental agreement.

If the Republic of Austria agrees to this proposal, I have the honour to propose that this Note and your Note. of confirmation shall constitute an Agreement between OPEC and the Republic of Austria amending the Headquarters Agreement which shall enter into force on the first day of the third month following the day the Government of the Republic of Austria has notified OPEC that the necessary constitutional requirements for its entry into force have been met."

I have the honour to confirm that the Republic of Austria agrees to the above proposal and that your Note and this Note of reply shall constitute an Agreement between OPEC and the Republic of Austria amending the Headquarters Agreement which shall enter into force on the first day of the third month following the day the Government of the Republic of Austria has notified OPEC that the necessary constitutional requirements for its entry into force have been met.

Accept, Excellency, the assurances of my highest consideration.

(signed)

Leopold Gratz

His Excellency
Dr. Fadhil J. Al-Chalabi
Deputy Secretary General of the
Organization of the Petroleum
Exporting Countries
Vienna

The notification referred to in the last paragraph of the opening Note having been communicated to OPEC by Austria in its Note of 9th July 1985, this Exchange of Notes therefore enters into force on 1st October 1985.

Sinowatz

NOTE FOR RECORD

The Secretary General spoke on the telephone today to the Director, Research Division, during which they discussed the question of the notice of complaint filed by Prewitt Enterprises Inc., in the United States District Court for the Northern District of Alabama, alleging that the price-setting practices of OPEC violated the US anti-trust laws. In this regard, Dr. Lukman confirmed to Dr.. Ghanem that he is also of the opinion that the Secretariat should ignore the whole thing.

JM
SGO
25.4.2000

xc: DRDO
LO
SGO

17 April, 2000

To: Dr. Sh. Ghanem
Director, Research Division
In Charge of the Secretariat

Subject: Summons – US District Court

Please find attached a letter from a US District Court, notifying us of a plaintiff demanding a trial by jury according to the Federal Rules of Civil Procedure and requesting that an answer be mailed or delivered within 20 days from the date of delivery of this summons.

As this letter appears to be originating from a genuine court office, I would suggest to involve our Legal Officer in order to examine the legality of this matter.

The above and attached are for your kind attention, please. Thank you.

HUDDIE DEWANTO
Huddie Dewanto
Budget & Accounts Officer
In charge of
Administration & Human Resources Department

Encl.

/goe

Supreme Court, U.S.
FILED
JUN 28 2004
OFFICE OF THE CLERK

No. 03-1592

IN THE

Supreme Court of the United States

PREWITT ENTERPRISES, INC., *et al.*,
Petitioners,

v.

ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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June 28, 2004

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QUESTION PRESENTED

Federal Rule of Civil Procedure 4(f)(3) provides that a district court "may" direct service by means other than those provided by Rule 4(f)(1) and (2). The question presented is whether the district court abused its discretion when it denied a post-judgment motion to serve the Organization of the Petroleum Exporting Countries ("OPEC") at its Vienna headquarters without consent, where such service was prohibited by, and would have caused a substantial affront to, Austrian law.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Prewitt Enterprises, Inc. ("Prewitt"), the appellant below, represents a certified plaintiff class of U.S. consumers of refined petroleum products (except federal judges). D. Ct. Doc. 12; *see* Pet. 4 ("the district court . . . certified a class").

Respondent OPEC, the appellee below, is an inter-governmental organization founded by treaty in 1960. Its membership consists of eleven sovereign states. OPEC's headquarters are located in Vienna, Austria.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
RULES INVOLVED	2
FOREIGN LAW INVOLVED	2
STATEMENT	2
REASONS FOR DENYING REVIEW	8
I. THE COURT OF APPEALS' DECISION IS CORRECT	9
II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT	12
III. THE HOLDING BELOW APPLIES ONLY IN NARROW CIRCUMSTANCES AND DOES NOT WARRANT THIS COURT'S REVIEW	14
A. The Decision Below Is Fact-Bound and Its Application Is Limited to Extraordinary Circumstances Involving International Organizations of Sovereigns	14
B. The Decision Below Presents No FSIA Question	15
CONCLUSION	17

TABLE OF CONTENTS—Continued

APPENDICES Page

FED. R. CIV. P. 4(H) 1a

AUSTRIAN SERVICE ACT ¶ 11 ..... 2a

LETTER FROM AUSTRIAN GOVERNMENT TO DISTRICT COURT 3a

TABLE OF AUTHORITIES

CASES

Page

Jones v. U.S., 527 U.S. 373, 119 S. Ct. 2090 (1999) 13

Northwest Airlines, Inc. v. County of Kent, Mich., 510 U.S. 355, 114 S. Ct. 855 (1994) 13

Prewitt Enterprises, Inc. v. OPEC, No. CV-00-W-0865-S, 2001 WL 624789 (N.D. Ala. Mar. 22, 2001) 4

Prewitt Enterprises, Inc. v. OPEC, 353 F.3d 916 (11th Cir. 2003) ..... *passim*

Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002) ..... *passim*

U.S. STATUTES AND TREATIES

Agreement between the United Nations and the United States Regarding the Headquarters of the United Nations, Nov. 21, 1947, 61 Stat. 3416 ..... 3, 10, 15, 16

Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418 4

Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602 *et seq.* 15, 16

Headquarters Agreement between the United States and the Organization of American States, May 14, 1992 ..... 3, 16

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 4(f)(1) i

Fed. R. Civ. P. 4(f)(2)(A) 7

Fed. R. Civ. P. 4(f)(2)(C) 5, 7

Fed. R. Civ. P. 4(f)(3) ..... *passim*

Fed. R. Civ. P. 4(h) 2, 4

Fed. R. Civ. P. 44.1 5

TABLE OF AUTHORITIES—Continued

Page

Fed. R. Civ. P. 59 ..... 6, 13
Fed. R. Civ. P. 60(b) 4

FOREIGN STATUTES AND TREATIES

Agreement between the Republic of Austria and the Organization of the Petroleum Exporting Countries Regarding Headquarters of the Organization of the Petroleum Exporting Countries, July 11, 1974, Austrian Official Gazette (BGBL) 382/1974 ..... 2, 3, 5, 10, 14
Agreement between the Republic of Austria and United Nations Regarding the Seat of the United Nations in Vienna, Nov. 29, 1995, 2023 U.N.T.S. 254, 259 ..... 4, 10
Austrian Service Act, Austrian Official Gazette (BGBL) 200/1982 ..... 2, 5, 14
OPEC Statute (2000) 3

OTHER AUTHORITIES

Prepared Statement of the Federal Trade Commission, Solutions to Competitive Problems in the Oil Industry, before the House Committee on the Judiciary (Mar. 29, 2000) 11

IN THE

Supreme Court of the United States

No. 03-1592

PREWITT ENTERPRISES, INC., *et al.*,
Petitioners,

v.

ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 353 F.3d 916. The opinions of the district court (Pet. App. 24a-39a) are unpublished.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2003. Prewitt's request for rehearing was denied on March 2, 2004. The petition for a writ of certiorari was filed on May 25, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

RULES INVOLVED

Rule 4(f)(3) of the Federal Rules of Civil Procedure provides:

> **(f) Service Upon Individuals in a Foreign Country.** Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within any judicial district of the United States: (3) by other means not prohibited by international agreement as may be directed by the court.

The full text of Rule 4(f) is set out at Pet. App. 40a-41a. Rule 4(h), which extends Rule 4(f) to service on "unincorporated associations," is set out at App., *infra*, 1a.

FOREIGN LAW INVOLVED

The Agreement between OPEC and the Republic of Austria Regarding the Headquarters of OPEC (Art. 5(2)) is set forth at Pet. App. 46a. The Austrian Law on Service of Legal Documents (¶ 11(2)) is set forth at App., *infra*, 2a.

STATEMENT

Austrian law forbids service of process on OPEC at its Vienna headquarters absent the express consent of OPEC's Secretary General. The district court denied Prewitt's post-judgment motion to serve OPEC at its Vienna headquarters by alternative means under Federal Rule of Civil Procedure 4(f)(3), which allows for the possibility of such service in a foreign country "as may be directed by the [district] court." The court of appeals affirmed the district court's order as within the discretion Rule 4(f)(3) provides on the record presented. In so ruling, the court of appeals gave appropriate respect to Austrian sovereignty in the particular circumstances of this case. Its decision is correct as a matter

of law, creates no conflict with a decision of any other circuit, and does not merit review by this Court.

Constitution and Headquarters of OPEC

In 1960, a treaty among five sovereign nations created OPEC as a "permanent intergovernmental organization." OPEC now has eleven members, each a sovereign state. The purposes for which OPEC was created include "the co-ordination and unification of the petroleum policies of Member Countries and the determination of the best means for safeguarding their interests, individually and collectively." D. Ct. Doc. 1 at ¶ 18; D. Ct. Doc. 80, Ex. 2 at Arts. 1, 2(a). OPEC, like other international organizations, has privileges and immunities under international law.

OPEC's headquarters are located in Vienna, Austria. A 1974 international treaty between OPEC and Austria, known as the OPEC Headquarters Agreement, governs OPEC's status and rights under Austrian law. Pet. App. 42a-74a. The Headquarters Agreement is both a treaty under international law and legislation approved by the Austrian Parliament, made part of Austrian law, and published in the Austrian Gazette. Pet. App. 32a; App., *infra*, 3a-5a; D. Ct. Doc. 56, Ex. 8 at ¶ 12. Article 5(2) of the Headquarters Agreement between Austria and OPEC provides that "service of process shall not take place within the headquarters seat except with the express consent of, and under conditions approved by, the Secretary General." Pet. App. 46a. Both Austria and the United States have entered into headquarters agreements with other international organizations, including the United Nations and the Organization of American States, containing substantially identical provisions regarding service.[1]

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[1] *See* Agreement Between the United Nations and the United States Regarding the Headquarters of the United Nations, Nov. 21, 1947, 61 Stat. 3416; Headquarters Agreement between the United States and the Organization of American States, May 14, 1992, art. IX(1), http://www.

Proceedings in the District Court

In April 2000, Prewitt filed this case in the United States District Court for the Northern District of Alabama. Prewitt is an Alabama corporation and the owner of a gasoline station in Birmingham, Alabama. The complaint alleges that OPEC and its "co-conspirators" violated the U.S. antitrust laws, and seeks injunctive relief. Prewitt chose to serve OPEC by registered mail as an "unincorporated association" located outside the United States under Rules 4(f) and 4(h) of the Federal Rules of Civil Procedure.

OPEC initially did not appear. As a result, on March 22, 2001, the district court entered a default judgment against OPEC, enjoined OPEC from further activities deemed to violate the U.S. antitrust laws, and extended the injunction to any persons "in active concert and participation" with OPEC "who receive actual notice" of the injunction. Thereupon, OPEC made a special appearance and moved for post-judgment relief under Rule 60(b). The district court vacated the default judgment "[s]o that service of process and jurisdictional issues may be considered by the Court in an adversarial context."[2]

On June 29, 2001, OPEC moved to dismiss the complaint. With respect to the sufficiency of service, OPEC submitted detailed evidence of Austrian law under Federal Rule of Civil

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oas.org/legal/english/docs/BilateralAgree/us/sedeusa.htm; Agreement between the Republic of Austria and United Nations Regarding the Seat of the United Nations in Vienna, Nov. 29, 1995, 2023 U.N.T.S. 254, 259; Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1418; *see also* C.A. Brief of Amicus Curiae Rep. of Austria (listing agreements); C.A. Brief of Amicus Curiae Org. of American States.

[2] Prewitt claimed federal question jurisdiction. OPEC denied that the district court had either subject matter or personal jurisdiction. Because of the failure of service, the courts below never reached the jurisdictional issues (or other defenses) and they are not presented here.

Procedure 44.1. OPEC proved that Prewitt's attempt to serve OPEC was prohibited by Austrian law and, therefore, was ineffective under Federal Rule of Civil Procedure 4(f)(2)(C). In addition, the Austrian Government wrote a letter directly to the district court confirming that Austrian law prohibits the method of service attempted by Prewitt. App., *infra*, 3a-5a (letter to district court); D. Ct. Doc. 80, Ex. 4 (diplomatic note to OPEC). The Austrian Government explained:

> Under both Austrian law and international agreements concluded between Austria and international organisations based in Vienna, service of legal process to . . . international organisations entitled to privileges and immunities in general, and OPEC in particular, may only be effectuated through diplomatic channels, i.e. with the assistance of the Federal Ministry for Foreign Affairs. As a consequence, any other form of service to said persons or international organisations is to be considered contrary both to Austrian and international law.
>
> The Austrian Law on the Service of Legal Documents ("Zustellgesetz") provides in its Para. 11 (2) that the service of legal documents to . . . international organisations who are entitled to privileges and immunities shall be carried out with the assistance of the Federal Ministry for Foreign Affairs. This excludes any other form of service of legal documents on such international organizations, including OPEC.
>
> Specifically, with respect to service on OPEC, Article 5 (2) of the Agreement between the Republic of Austria and the OPEC regarding the headquarters of the OPEC provides that "the service of legal process . . . *shall not* take place within the headquarters seat except with the express consent of, and under condition[s] approved by, the Secretary General" (emphasis added). This international agreement . . . is an integral part of Austrian law . . . .

> As a result, any form of service on OPEC at its headquarters in Vienna that is not effectuated in accordance with the above-quoted procedure is to be considered contrary both to Austrian and international law. Such service has to be regarded as invalid and, therefore, also as "prohibited by Austrian law," without though implying criminal sanctions.

The District Court's Decision

On August 2, 2002, the district court granted OPEC's motion to dismiss for failure of service. The court "conclude[d] that OPEC was not effectively served even though it actually received the summons and complaint, as unconsented to service by registered mail on OPEC is prohibited by Austrian law." Pet. App. 36a. The district court explained that "[t]he [Federal Rules of Civil Procedure] reflect a clearly expressed diplomatic policy choice of Congress to respect the normative and, ultimately, the legislative, decisions of foreign sovereigns." *Id.*

The Post-Judgment Motion for Alternative Service

Prewitt moved to amend the judgment to authorize alternative service of process under Federal Rules of Civil Procedure 4(f)(3) and 59(e). Prewitt asked the district court to direct service on OPEC at its Vienna headquarters by one of four methods: registered mail, courier, email, and facsimile. OPEC argued that Austria had passed two statutes prohibiting service on OPEC absent consent and had also stated its official view opposing service without OPEC's express consent. In these particular circumstances, ordering service in violation of Austrian law would "giv[e] offense to Austria, as well as to the eleven sovereign nations who comprise the other party to the Headquarters Agreement."[3] On March 4,

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[3] D. Ct. Docs. 87, 122. OPEC also argued that it was inappropriate for Prewitt to use Rule 59 as a vehicle for advancing a belated motion under

2003, the district court exercised its discretion not to order alternative service in the manner Prewitt requested. Pet. App. 38a.

The Court of Appeals' Decision

A unanimous panel of the United States Court of Appeals for the Eleventh Circuit affirmed. The court of appeals held that Prewitt's attempted service of process upon OPEC by registered mail was ineffective. It reasoned that Federal Rule of Civil Procedure 4(f)(2)(C)(ii) "clearly states that service of process by registered mail is only authorized where not prohibited by foreign law" and that Austrian law "expressly prohibits all service of process upon OPEC within the headquarters seat that has not been consented to by the Secretary General." Pet. App. 15a.[4]

Turning to Federal Rule of Civil Procedure 4(f)(3), the court of appeals considered whether the district court had discretion under this rule to decline to order alternative service. Following the decision of the United States Court of Appeals for the Ninth Circuit in *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (2002), the court of appeals "join[ed] [its] sister circuit in holding that the district court's denial of a motion for alternative service of process under Fed. R. Civ. P. 4(f)(3) is subject to an abuse of discretion standard [of review] because the plain language of the rule stipulates that the district court 'may' direct alternative means of service." Pet. App. 7a. Applying that standard, the court of appeals held that the "district court did not abuse its discre-

---

Rule 4(f)(3) and that OPEC is not an "unincorporated association" subject to service under Rule 4(f). D. Ct. Doc. 122.

[4] In addition, the court of appeals reasoned that service by registered mail was invalid under Federal Rule of Civil Procedure 4(f)(2)(A), which permits service in another country "in a manner prescribed by the law of the foreign country," because Austrian law did not "prescribe" that manner of service on OPEC. Pet. App. 15a-17a.

tion in denying Prewitt's motion to authorize alternative means of service." Pet. App. 7a, 21a. The court of appeals explained that "the failure to obtain OPEC's consent would constitute a substantial affront to Austrian law," which "clearly provides protection to OPEC as an international organization . . . and also requires that any service of process from abroad be effected through Austrian authorities." Pet. App. 20a, 21a. Finally, the court of appeals stated:

> We do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ P. 4(f)(3) that is in contravention of a foreign law. Rather, we are satisfied that under the facts and circumstances of this case, directing service of process would constitute a clear abuse of discretion.

Pet. App. 21a n.21 (emphasis court's).

REASONS FOR DENYING REVIEW

The court of appeals' decision is correct and does not conflict with the decisions of this Court or any other court of appeals. The court of appeals below correctly held that the district court had discretion under Federal Rule of Civil Procedure 4(f)(3) not to order alternative service and that "there is no abuse of discretion here." Pet. App. 19a. Prewitt's suggestion that this fact-bound decision merits this Court's review rests entirely on an erroneous reading of the opinion of the court of appeals.

Prewitt claims that the court of appeals "holds that whenever a foreign state enters into an agreement designed to insulate an entity located within that state from service in U.S. courts, that agreement is always effective." Pet. 15. On this premise, Prewitt contends that the court of appeals' decision misreads Rule 4(f)(3), conflicts with the Ninth Circuit's decision in *Rio Properties*, and creates a "massive loophole" that allegedly allows a parade of private law-

breakers to avoid service with the connivance of foreign governments. Pet. 7-8.

The petition mischaracterizes the court of appeals' decision. The court of appeals did *not* hold that Rule 4(f)(3) obligates the district courts to respect every provision of foreign law, far less every agreement between every government and every organization. Rather, the court of appeals was clear about the limits of its ruling: "We do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law." *See* Pet. App. 21a n.21 (emphasis court's). Thus, the court of appeals correctly reads Rule 4(f)(3) as a grant of permissive authority, a reading entirely consistent with the Ninth Circuit's decision in *Rio Properties* that creates no division among the courts of appeals.

The decision below does no more than affirm a district court's denial of service on OPEC as an exercise of that court's informed *discretion*. Because it carefully limits its reasoning to the special circumstances of international organizations and reserves the district courts' power to order alternative service in appropriate circumstances, the decision creates no shield behind which private lawbreakers could plausibly exempt themselves from service of process. The petition does not merit this Court's review.

I. THE COURT OF APPEALS' DECISION IS CORRECT

The court of appeals correctly held that, in the particular factual circumstances of this case, the district court did not abuse its discretion by declining to order alternative service on OPEC in Austria in violation of Austrian law. By its terms, Rule 4(f)(3) vests discretion in the district court, providing only for such alternative service "as *may* be directed by the [district] court." (Emphasis added.) Nothing in the text of the Rule obligates the district court to direct alternative

service in every case or precludes the district court from considering such factors (including considerations of foreign law and sovereignty) as it deems relevant to its decision whether to direct service in a particular case.[5]

The district court's judgment that the circumstances here did not justify authorization of additional methods of service was well within the scope of reasonable discretion. Prewitt had asked the district court to override the express terms of the OPEC Headquarters Agreement, an Austrian treaty and statute identical in substance to the treaties the United States and Austria have executed in connection with the establishment of the United Nations headquarters. Such headquarters agreements between host countries and international organizations are a standard mechanism to facilitate discussions and cooperative efforts between nation states. Indeed, the specific service provision in Article 5(2) of the OPEC Headquarters Agreement "is commonly found in numerous other Headquarters Agreements between sovereign states and international organizations around the world." Pet. App. 13a n.12.

The OPEC Headquarters Agreement is explicit, it was validly enacted into Austrian law by the Austrian Parliament, and its application to OPEC is beyond doubt. The challenge that service on OPEC would have presented to Austrian sovereignty is tangible. Indeed, the Austrian Government had directly communicated to the district court its official opposition to service on OPEC except in accordance with the OPEC Headquarters Agreement. App., *infra*, 3a-5a. In these unique circumstances, the court of appeals correctly concluded that the district court's decision to refrain from authorizing

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[5] To the contrary, the text of the Rule sets forth only one constraint on the district courts' discretion: a district court ordering service in a particular case must ensure that such service is not "prohibited by international agreement." OPEC did not contend that the Headquarters Agreement was an "international agreement" within the meaning of the Rule.

alternative service in contravention of foreign law was not an abuse of discretion.[6]

Prewitt misstates the holding below by claiming that the court of appeals established an absolute bar against service abroad in violation of foreign law. The court below did no such thing.[7] To the contrary, the court of appeals affirmatively disclaimed the reading Prewitt now advances. It is difficult to conceive of language less equivocal than "[w]e do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law." Pet. App. 21a n.21 (emphasis court's).[8] The court of appeals did not purport to answer any

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[6] Another unique factor faced by the district court was the reality that an antitrust lawsuit against OPEC would raise "significant diplomatic considerations" for the United States, involving "defense policy, energy policy [and] foreign policy." *See* Prepared Statement of the Federal Trade Commission, *Solutions to Competitive Problems in the Oil Industry*, before the House Committee on the Judiciary (Mar. 29, 2000) at 4-5, *available at* http://www.ftc.gov/os/2000/03/opectestimony.htm (approved unanimously).

[7] The petition devotes several pages to one sentence in the opinion below: "On these facts, we cannot read 4(f)(3) as permitting that which has already been specifically prohibited under 4(f)(2)." Pet. 18-21. This sentence, however, has nothing to do with the issue on which *certiorari* has been sought. In this sentence, the court below held only that service by registered mail cannot be effected under Rule 4(f)(3) because registered mail is addressed in Rule 4(f)(2) and Rule 4(f)(3) only addresses "other means" of service. Pet. App. 18a-19a. Prewitt does not even claim that a conflict exists on this modest question of procedure with no policy import whatever.

[8] Accordingly, the court of appeals did not read the Advisory Committee Notes to supplant district court discretion under Rule 4(f)(3) to order service in violation of foreign law in an appropriate case. Pet. 21-23. Instead, it referenced the Notes' guidance to "minimize[] offense to foreign law" as a touchstone when considering the propriety of the district court's decision to deny alternative service that would have caused a "substantial affront" to a specific Austrian law expressly prohibiting such service on the specific international organization sought to be served. Pet.

question beyond whether the district court's decision denying alternative service on OPEC constituted an "abuse of discretion." Pet. App. 7a, 19a, 21a. The decision below, which does nothing more than affirm the district court's application of Rule 4(f)(3) to the "facts and circumstances of this case," does not merit this Court's review. Pet. App. 21a n.21; *see also id.* at 3a ("in this case"); 7a ("under the circumstances here"); 19a ("[o]n these facts"); 21a ("[i]n this case").

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT COURT

Contrary to Prewitt's assertion, the decision below does not conflict with the decision of the Ninth Circuit in *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007 (9th Cir. 2002). The supposed conflict depends on Prewitt's erroneous view that the court of appeals erected an absolute bar against ever authorizing Rule 4(f)(3) service in contravention of foreign law. As the court of appeals expressly disavowed that position, there can be no conflict.[9]

App. 20a. Prewitt, on the other hand, cites the Advisory Committee Notes for the proposition that "one of the purposes of Rule 4(f)(3) was to prevent foreign courts or other authorities from attempting to frustrate service . . . of a complaint seeking . . . to enforce the antitrust laws of the United States." Pet. 15-16. But, the Notes do not say that a district court must direct service in contravention of foreign law in any and all antitrust cases. To the contrary, the Notes make clear that this example is simply one of the "circumstances that *might* justify the use of additional methods" and "the court *may* direct" alternative service "[i]n such cases." (Emphasis added.)

[9] Even if there were a conflict between the two appellate courts about the discretion of district courts under Rule 4(f)(3) to order alternate service in contravention of foreign law, this case would present a poor vehicle to resolve it. At least two antecedent issues that OPEC argued below—and preserves here as alternative grounds supporting the decision below—could prevent this Court from reaching that question. First, it was improper for Prewitt to wait deliberately until after the district court had

In *Rio Properties*, the Ninth Circuit affirmed an order authorizing Rule 4(f)(3) service on a Costa Rican internet company by email and at two places in the United States. 284 F.3d at 1012-13. The Ninth Circuit had no occasion to analyze the propriety of a decision to deny alternative service in the face of an express prohibition by a foreign state. The court of appeals properly distinguished *Rio Properties* as "not at all applicable to the circumstances here." Pet. App. 20a.

In any event, the discussion in *Rio Properties* fully comports with the analysis below. Indeed, in articulating the central role of district court discretion in Rule 4(f)(3), the court of appeals expressly followed *Rio Properties* stating, "[W]e join our sister circuit in holding that the district court's denial of a motion for alternative service of process under Fed. R. Civ. P. 4(f)(3) is subject to an abuse of discretion standard because the plain language of the rule stipulates that the district court 'may' direct alternative means of service. *Rio Properties, Inc. v. Rio Int'l Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002)." Pet. App. 7a. Similarly, the Ninth Circuit in *Rio Properties* was unequivocal that "we commit to the sound discretion of the district court the task of determining when the particularities and necessities of a given case require alternative service under Rule 4(f)(3)." 284 F.3d at 1016. That commitment encompasses the power to determine that the "particularities and necessities of a given case" *do not warrant* alternative service—the precise conclusion reached by the trial court here and affirmed on appeal.

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already dismissed its case before raising the Rule 4(f)(3) issues through a Rule 59(e) motion for post-judgment relief. Second, OPEC is not an "unincorporated association" capable of being served under any prong of Rule 4(f). *See Northwest Airlines, Inc. v. County of Kent, Mich.*, 510 U.S. 355, 114 S. Ct. 855, 862 (1994) (a prevailing party may "defend a judgment on any ground properly raised below"); *Jones v. U.S.*, 527 U.S. 373, 119 S. Ct. 2090, 2105-06 (1999).

III. THE HOLDING BELOW APPLIES ONLY IN NARROW CIRCUMSTANCES AND DOES NOT WARRANT THIS COURT'S REVIEW

A. The Decision Below Is Fact-Bound and Its Application Is Limited to Extraordinary Circumstances Involving International Organizations of Sovereigns

Prewitt claims that the court of appeals' holding allows "*any* foreign government [to] agree with *any* organization located within its borders" to preclude U.S. service. Pet. 7 (emphasis added). In fact, the decision below nowhere suggests that service could be frustrated by agreements between sovereigns and private "nationals, business organizations and unincorporated associations." Pet. 10. Rather, the court of appeals relied on the sovereign character of the OPEC Headquarters Agreement, which "was enacted into law by resolution of the Austrian Parliament" (Pet. App. 13a), as well as the special character of "international organizations such as OPEC," which are governed by a special provision of Austrian law regulating service on "international organizations that enjoy privileges and immunities under international law." Pet. App. 17a (quoting Austrian Service Act, ¶ 11(2), App., *infra*, 2a). Thus, the only plausible application of the decision below is to those extraordinary circumstances where a sovereign, serving as the host to an international organization of sovereign states, expressly establishes conditions of service through formal acts of state such as treaties and statutes.[10]

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[10] Thus, the court of appeals did not create a "loophole" in the service rules permitting "unscrupulous foreign governments . . . to insulate entities within their borders from liability for wrongdoing in U.S. courts," as Prewitt would have it. Pet. 9. The case below did not involve any allegation that the decision of the Government of Austria in 1974 to enter into a headquarters agreement with OPEC involved any less scrupulous a

Nothing in the decision below permits "any foreign country to completely protect any person or organization within its borders from the U.S. courts." Pet. 11. To the contrary, the court of appeals carefully restricted its decision to the "facts and circumstances of this case." The limited scope of the decision below fully preserves the ability of a district court to authorize service by alternative means in circumstances where a rogue nation seeks to insulate criminal elements within its borders from judicial process. The propriety of Rule 4(f)(3) service in the hypothetical circumstances imagined by Prewitt was neither presented to nor decided by the courts below, and may be left safely to the district courts to address in the first instance should such circumstances ever arise.[11] Accordingly, Prewitt's claim that the opinion below presents a question of "exceptional importance" (Pet. 13) is misconceived.

B. The Decision Below Does Not Present Any FSIA Question

Prewitt also claims that the decision below would subvert the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602 *et seq.* (the "FSIA"), by "completely immuniz[ing] corporations or unincorporated associations" from liability under the FSIA. Pet. 12. But Prewitt did not sue either OPEC or its member countries under the FSIA, and did not attempt to serve those countries or OPEC under the

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decision than the decision of the United States to enter into a substantially identical agreement with the United Nations.

[11] It is more than hyperbolic to compare the invocation by an organization of sovereign nations of standard headquarters agreement language to "evasion of service" by the Mafia or the Cali drug cartel, Pet. 10, particularly when the United States has included the same clauses in its own headquarters agreements and surely expects them to be both invoked and honored. Accordingly, the application of law by the court below to the facts presented here does not "run[] counter to the policy condemning attempts to evade or obstruct service of process." Pet. 9.

special service provisions in the FSIA that it now cites. Pet. 13 (citing 28 U.S.C. § 1608(b)). Instead, Prewitt crafted a strategy designed to avoid the question of FSIA immunity by pursuing OPEC as an unincorporated association subject to Rule 4(f) service—completely outside the scheme of the FSIA. The lawsuit as crafted by Prewitt thus came to focus on the district court's discretion under Rule 4(f)(3) and the opinion below could not possibly implicate the FSIA's "theory of sovereign immunity." Pet. 12. Likewise, neither Austria's sovereign decision to enter into a headquarters agreement with OPEC nor the United States' sovereign decision to enter into headquarters agreements with the United Nations and the Organization of American States poses any possible threat to the restrictive theory of sovereign immunity. More fundamentally, just like Prewitt's other claims, its FSIA argument hangs upon the faulty premise that the court below created an absolute bar against service abroad in violation of all "agreements" entered by foreign governments. Since the court of appeals expressly held that a district court has discretion under Rule 4(f)(3) to order service in violation of foreign law, the decision below announces no rule that could possibly subvert the FSIA. Pet. App. 21a n.21.[12]

In the end, Prewitt's FSIA argument boils down to the assertion that it is "incongruous[]" for the district court to decline to order service on OPEC when it would have been possible for Prewitt (if it had chosen to do so) to serve "OPEC's fifteen [sic] member states" under the FSIA. Pet. 13. This assertion, however, is nothing more than a policy objection to the political and diplomatic judgments embedded in the service provisions of the OPEC Headquarters Agreement, the United States' Headquarters Agree-

[12] Prewitt's FSIA arguments also miss an obvious difference between service on states and service on international organizations. Only international organizations have headquarters and, thus, only international organizations have headquarters agreements.

ment with the United Nations, and "numerous other Headquarters Agreements between sovereign states and international organizations around the world." Pet. App. 13a n.12.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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June 28, 2004

APPENDIX

APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

II. COMMENCEMENT OF ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 4. Summons

* * * *

(h) Service Upon Corporations and Associations. Unless otherwise provided by federal law, service upon a domestic or foreign corporation or upon a partnership or other unincorporated association that is subject to suit under a common name, and from which a waiver of service has not been obtained and filed, shall be effected:

(1) in a judicial district of the United States in the manner prescribed for individuals by subdivision (e)(1), or by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the defendant, or

(2) in a place not within any judicial district of the United States in any manner prescribed for individuals by subdivision (f) except personal delivery as provided in paragraph (2)(C)(i) thereof.

* * * *

Long Title

Federal Law of April 1, 1982 on the Service of Official Documents (Service Act)

StF: BGB1. No. 200/1982

Change
as last amended by: BGB1. No. 357/1990 (NR: GP XVII RV 1089 AB 1350 p. 145 BR: AB 3889 p. 531.)

BGB1. I No. 158/1998 (NR: GP XX AB 1167 p. 119 BR: AB 5676 p. 642.)

SECTION I
General Terms and Conditions
Special Cases of Service

§ 11. (1) Service of process abroad shall be undertaken in accordance with existing international agreements or else in the manner provided for by the laws or other legal provisions of the state in which service is to be effected, or as provided by international practice, if necessary with the participation of Austrian representing authorities.

(2) The mediation of the Federal Ministry for Foreign Affairs shall be enlisted in undertaking service of process on foreigners or international organizations that enjoy privileges and immunities under international law, regardless of their place of residence or headquarters.

(3) Service of process on members of entities that are sent abroad to provide aid at the request of an international organization or the League of Red Cross Associations shall be undertaken by way of the entity's principal.

Austrian Embassy
3524 International Court, NW
Washington, DC 20008-3027

[Filed Jan 10, 2002]

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Ref. No. 6.50/55/01

To the
US District Court for the
Northern District of Alabama
Southern Division
Attention Clerk of the Court
Hugo L Black US Court House
1729 N Fifth Avenue
Birmingham, AL 35203

01-08-2002

Re: Prewitt Enterprises, Inc. vs. Organization of the Petroleum Exporting Countries ("OPEC"), Civil Action Number 00-C-0865-S

Dear Sir,

The Embassy of Austria has been instructed by the Austrian Federal Ministry for Foreign Affairs in Vienna, to inform the Hororable Court as follows:

Under both Austrian law and international agreements concluded between Austria and international organisations based in Vienna, service of legal process to foreign citizens or international organisations entitled to privileges and immunities in general, and OPEC in particular, may only be effectuated through diplomatic channels, i.e. with the assistance of the Federal Ministry for Foreign Affairs. As a consequence, any other form of service to said persons or international organisations is to be considered contrary both to Austrian and international law.

The Austrian law on the Service of Legal Documents ("Zustellgesetz") provides in its Para. 11 (2) that the service of legal documents to foreign citizens or international organisations who are entitled to privileges and immunities shall be carried out with the assistance of the Federal Ministry for Foreign Affairs. This excludes any other form of service of legal documents on such international organisations, including OPEC.

Specifically, with respect to service on OPEC; Article 5 (2) of the Agreement between the Republic of Austria and the OPEC regarding the headquarters of the OPEC provides that "the service of legal process, including the seizure of private property, *shall not* take place within the headquarters seat except with the express consent of, and under condition approved by, the "Secretary General" (emphasis added). This international agreement, which was approved by the Austrian Parliament in accordance with Article 50 of the Austrian Constitution, is an integral part of Austrian law; the provision concerned corresponds to similar provisions of other headquarters agreements with international organisations based in Vienna (such as the United Nations Organization (Office at Vienna), the United Nations Industrial Development Organization and the International Atomic Energy Agency).

As a result, any form of service on OPEC at its headquarters in Vienna that is not effectuated in accordance with the above-quoted procedure is to be considered contrary both to Austrian and international law. Such service has to be regarded as invalid and, therefore, also as "prohibited by Austrian law", without though implying criminal sanctions.

The Federal Ministry for Foreign Affairs in Vienna through the intermediary of the Austrian Embassy in Washington, DC would like to state that in making this submission to the

Honorable Court it is not the intent of the Government of Austria to submit itself to the jurisdiction of the Court.

Sincerely yours,

/s/ Melitta Schubert
MELITTA SCHUBERT
Deputy Chief of Mission

[SEAL]

No. 03-1592

FILED
JUL 13 2004

IN THE

Supreme Court of the United States

PREWITT ENTERPRISES, INC., *et al.*,

Petitioners,

—v.—

ORGANIZATION OF THE PETROLEUM EXPORTING COUNTRIES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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July 13, 2004

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REPLY FOR THE PETITIONER	1
I. THE CIRCUIT COURT OPINION HOLDS THAT *ANY* FOREIGN SOVEREIGN CAN INSULATE *ANY* ENTITY WITHIN ITS BORDERS FROM SERVICE OF PROCESS	2
II. THE QUESTION PRESENTED IS VITALLY IMPORTANT	5
CONCLUSION	10

TABLE OF AUTHORITIES

Cases: PAGE

Columbia Grain, Inc. v. Or. Ins. Guar. Ass'n, 22 F.3d 928 (9th Cir. 1994)..... 4

Prewitt Enters., Inc. v. OPEC, 353 F.3d 916 (11th Cir. 2003) 3, 4, 7, 10

Rio Props. v. Rio Int'l Interlink, 284 F.3d 1007 (9th Cir. 2002)..... 5, 6

Statutes and Treaties:

22 U.S.C. § 288..... 10

28 U.S.C. § 1602 *et seq.*..... 6

28 U.S.C. § 1605(a)(2)..... 10

28 U.S.C. § 1608 8

Rules:

Fed. R. Civ. P. 4(f)(3) 1-3, 5-9

REPLY FOR THE PETITIONER

The fundamental flaw in respondent's opposition to the Petition for a Writ of Certiorari is that it seeks to defend an opinion that the circuit court did not write. Respondent strains to portray the district court's opinion as an exercise of discretion not to fashion service of process pursuant to Rule 4(f)(3) and the circuit court's opinion as upholding that exercise of discretion, when both courts held that OPEC cannot be served with process *at all* as a matter of law. Respondent also strains to portray the circuit court's holding as a "fact-bound" opinion that depends on a large variety of factors unique to this case, when the *only* factor that the circuit court considered significant was the fact that Austria had passed legislation designed to insulate OPEC.

Respondent attempts to convey this misleading impression of the circuit court's opinion by quoting dicta from its footnotes and by quoting isolated phrases from the opinion without addressing the court's actual holding. However, even a cursory reading of the circuit court's opinion undercuts respondent's arguments, and demonstrates that the interpretation put forward in the Petition is correct. Respondent rests almost the *entirety* of its opposition to the Petition on its incorrect interpretation of the circuit court's decision and offers *no defense* of the circuit court's legal analysis. Nor does respondent defend the implications of the circuit court's holding, which allows *any* foreign government to insulate *any* defendant entity within its borders from service of process. Such a holding is indefensible, and granting certiorari is more than justified.

I. THE CIRCUIT COURT OPINION HOLDS THAT *ANY* FOREIGN SOVEREIGN CAN INSULATE *ANY* ENTITY WITHIN ITS BORDERS FROM SERVICE OF PROCESS.

OPEC quotes from dicta and out-of-context sentence fragments from the Eleventh Circuit's opinion in an attempt to make it seem that the circuit court did nothing more than decide "whether the district court's decision denying alternative service on OPEC constituted an 'abuse of discretion,' " Opp. at 12, and to make it appear that the circuit court's decision is so "fact-bound" that its holding would not actually allow all foreign sovereigns to protect any organizations located within their borders from U.S. service of process. *Id.* at 14. However, it is OPEC, and not the Petition, that miscasts the circuit court's opinion.

a. *Neither the district court nor the circuit court opinion reflected an exercise of discretion.* OPEC's argument that the district court and circuit court opinions reflect a proper exercise of discretion is simply inaccurate. Both the district court and circuit court opinions held, as a matter of law, that OPEC's Headquarters Agreement with Austria completely insulates OPEC from service of process.

The district court's one-sentence Order stating that OPEC "cannot in this case be effectively served with process," Pet. App. 19a, clearly demonstrates that it exercised no "discretion" in denying Prewitt's motion for court ordered service under Rule 4(f)(3). Rather, the district court ruled, as a matter of law, that OPEC "cannot" be served with process.

The circuit court's opinion is quite explicit in holding that, as a matter of law, OPEC cannot effectively be served with process under the Federal Rules. The

Eleventh Circuit stated: "[W]e are satisfied that under the facts and circumstances of this case, *directing service of process would constitute a clear abuse of discretion*." *Prewitt Enters., Inc. v. OPEC*, 353 F.3d 916, 928 n.21 (11th Cir. 2003) (emphasis added). Since the circuit court held that directing service of process would constitute a "clear abuse of discretion," it plainly did not hold that the district court's refusal to fashion service of process constituted a proper exercise of discretion. Rather, the circuit court held that the *only* proper course of action for the district court was to deny Prewitt's motion to fashion alternative means of service.

b. *The only relevant factor motivating the circuit court was the Headquarters Agreement.* In its opposition to the Petition, OPEC puts forward two "circumstances" that it claims make service inappropriate in this unique case. Opp. at 10-11. These circumstances are the fact that "Prewitt had asked the district court to override the express terms of the OPEC Headquarters Agreement," *id.* at 10, and OPEC's view that "an antitrust lawsuit against OPEC would raise 'significant diplomatic considerations.' " *Id.* at 11 n.6. However, the circuit court said *nothing* about "diplomatic considerations"; the only circumstance that it cited in holding that service under Rule 4(f)(3) would be improper was the fact that the Headquarters Agreement provided that service on OPEC could only take place with OPEC's consent, and OPEC had stated that it would not so consent. *Prewitt*, 353 F.3d at 928.

OPEC claims that the circuit court's opinion does not actually "establish[ ] an absolute bar against service abroad in violation of foreign law." Opp. at 11. In so claiming, OPEC cites the circuit court's statement that "[w]e do not say that a district court *never* has discretion to direct service of process under Fed. R. Civ. P. 4(f)(3) that is in contravention of a foreign law." *Prewitt*, 353

F.3d at 928 n.21. This statement, however, is meaningless dicta that reveals the fundamental incoherence of the circuit court's decision. While the circuit court purports to allow district courts to direct service of process that contravenes foreign law, it fails to explain in what circumstances such service could be directed. A plain reading of the circuit court's holding—rather than its dicta—demonstrates that the Eleventh Circuit would *not* allow service that contravenes the law of a foreign state since the *only* factor that the circuit court considered significant in holding that service was improper was the fact that the Headquarters Agreement prohibited such service. *See Columbia Grain, Inc. v. Or. Ins. Guar. Ass'n*, 22 F.3d 928, 933 (9th Cir. 1994) (refusing to give effect to a case's dicta where the dicta "contradicts the case's holding").

OPEC attempts to reconcile the circuit court's dicta with its holding by arguing that the decision below is "fact-bound." Opp. at 14-15. However, here OPEC again attempts to defend an opinion that was never written. First, OPEC states that "the court of appeals relied on the sovereign character of the OPEC Headquarters Agreement, which 'was enacted into law by resolution of the Austrian Parliament.' " Opp. at 14. This fact does not undercut Prewitt's argument, since *any* country is capable of passing legislation designed to insulate a defendant from service of process. Second, respondent claims that the court of appeals based its holding that service would be improper on the "special character of 'international organizations such as OPEC.' " *Id.* at 14 (quoting *Prewitt*, 353 F.3d at 926). Respondent's statement is simply untrue. The circuit court *never* refers to OPEC's "special character," nor does it ever seek to explain how OPEC's status as an "international organization" would make service on OPEC uniquely inappropriate. In fact, the quotation from *Prewitt* that respondent cites is taken

from the opinion's discussion of service under Rule 4(f)(2)—not from its discussion of Rule 4(f)(3). *See Prewitt*, 353 F.3d at 925-26.

Thus, the circuit court held that OPEC could not be served with process under the Federal Rules only because *a foreign government had passed legislation stating that a defendant could not be served without its consent*. Under the circuit court's holding—as opposed to the misleading dicta that it employed—any foreign government could pass similar legislation insulating a defendant from service of process.

c. *The circuit court's opinion was wrongly decided.* With this proper understanding of *Prewitt*'s holding, it becomes obvious that the circuit court's opinion was wrongly decided. OPEC does not take issue with the Petition's legal analysis. Instead, OPEC's *only* defense of *Prewitt* is the incorrect argument that "Prewitt misstates the holding below." Opp. at 11.

The petition provides detailed analysis explaining why the decision below misreads Rule 4(f)(3). As the Ninth Circuit has explained, "service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country." *Rio Properties v. Rio International Interlink*, 284 F.3d 1007, 1014 (9th Cir. 2002). Moreover, in holding that the Advisory Committee Notes preclude service on OPEC, the circuit court both improperly elevated the language of the Notes over the plain text of Rule 4(f)(3) and also misread the Notes themselves. Pet. at 21-23. OPEC does not dispute any of this legal analysis.

II. THE QUESTION PRESENTED IS VITALLY IMPORTANT.

The circuit court's mistaken decision is the type that merits this Court's attention for four reasons. *First*, the

circuit court's decision creates a circuit split. *Second*, the circuit court's opinion creates a massive loophole in the service of process rules. *Third*, the decision of the court below subverts the restrictive theory of sovereign immunity embodied in the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*. *Fourth*, this is an appropriate case for certiorari.

a. *Circuit split.* The decision of the court below conflicts with the Ninth Circuit's opinion in *Rio Properties*, 284 F.3d 1007. While the Eleventh Circuit held that service under Rule 4(f)(3) is ineffective if precluded by foreign law, the Ninth Circuit has stated that the laws of a foreign state pose no barrier to service of process under Rule 4(f)(3). *Id*. at 1014 ("[A]s long as court-directed and not prohibited by an international agreement, service of process ordered under Rule 4(f)(3) may be accomplished in contravention of the laws of the foreign country."). *See* Pet. at 13-16.

While OPEC argues that the decision below does not conflict with *Rio Properties*, its argument is entirely dependent on its contention that the Petition misreads *Prewitt*. *See* Opp. at 12. However, as explained in *supra* Part I, OPEC's reading of *Prewitt* is implausible.

OPEC makes two further arguments, both of which are facile at best. First, OPEC states that the court below properly held that *Rio Properties* was not applicable to the circumstances of the present case. This argument has already been answered in the petition, which explains that any factual distinctions between the two cases are irrelevant. Rather, the conflict between the two cases is demonstrated by the very principle that *Rio Properties* stands for, that it is acceptable for service under Rule 4(f)(3) to violate the laws of foreign states. Pet. at 14-15.

OPEC's second argument is that *Prewitt* is consonant with *Rio Properties* because both cases stand for the

proposition that denial of a motion for alternative service under Rule 4(f)(3) is subject to an abuse of discretion standard. Opp. at 13. There is no merit to the argument that the two cases are consistent because both claim to propound the same *standard of review*. Moreover, as explained in *supra* Part I, the abuse of discretion standard is irrelevant to *Prewitt* because both the district court and circuit court rested on the conclusion that OPEC could not be served as a matter of law.

b. *Massive loophole in the service of process rules.* OPEC does not take issue with the argument made in the Petition that, if petitioner's interpretation of *Prewitt* is correct, the decision creates a massive loophole in the rules governing service of process. Under the circuit court's interpretation, an agreement between a foreign state and a defendant can completely immunize the defendant from service. Colombia, Italy and Saudi Arabia could effectively insulate the Cali drug cartel, the Mafia, and al-Qaeda from service. *See* Pet. at 9-11.

While OPEC argues that this observation is "hyperbolic," there is *no* limiting principle apparent in *Prewitt* that would prevent such agreements from being extended to such organizations. A number of organizations hostile to the United States do enjoy the sponsorship of foreign states. Moreover, the Advisory Committee Notes to Rule 4(f)(3) express concern that foreign states may attempt to frustrate service of "a complaint seeking . . . to enforce the antitrust laws of the United States." Rule 4(f)(3) Advisory Committee Notes at 48. This concern cannot be regarded as hyperbolic, yet the circuit court's opinion would leave the federal courts with no way to prevent such frustration of the U.S. antitrust laws.

c. *Subversion of the FSIA.* The Petition explains that *Prewitt* turns the restrictive theory of sovereign immunity embodied in the FSIA on its head by allowing any

foreign states to completely immunize corporations or unincorporated associations within their borders by entering an agreement similar to the Headquarters Agreement. Pet. at 11-13.

OPEC replies that "Prewitt did not sue either OPEC or its member countries under the FSIA." Opp. at 15-16. This objection misses the point entirely. The point of the FSIA analogy is that the move from the absolute to restrictive theory of sovereign immunity was motivated in the first instance by the desire to prevent foreign countries' state trading companies from being insulated from suit while U.S. companies are amenable to suit in foreign courts. Pet. at 12. The absurdity of *Prewitt* is demonstrated by the fact that it turns the move to the restrictive theory on its head by creating a new class of foreign entities that can injure U.S. companies, and even file suit against U.S. companies, but cannot be sued by them. *Id.* The circuit court quite literally provided OPEC with protection *greater* than what a foreign sovereign would receive. *See* 28 U.S.C. § 1608. The fact that this lawsuit was not brought pursuant to the FSIA and yet OPEC (whose members are sovereigns) has received greater protection than it would if it *were* a sovereign, demonstrates just how *Prewitt* creates massive inconsistencies in U.S. law.

While OPEC contends that Prewitt's FSIA argument "is nothing more than a policy objection to the political and diplomatic judgments embedded in the service provisions of the OPEC Headquarters Agreement," Opp. at 16, Prewitt does not ask the Court to make *any* policy determinations. Instead, the Petition simply asks the Court to correctly interpret the laws of the United States.

It is OPEC and not the petitioner that attempts to foist policy considerations upon the Court. Rather than defending *Prewitt*'s holding, OPEC proffers a number of *policy*

concerns—such as "diplomatic considerations" and the "special character" of OPEC, *see* Opp. at 11 n.6, 14—that *the Eleventh Circuit never even mentioned*. Only OPEC can be described as raising policy objections to the laws of the United States, because only OPEC asks this Court to infer arguments that neither court below ever advanced in defense of an opinion that neither court below ever wrote.

d. *This is an appropriate case for a writ of certiorari.* This is an appropriate case for granting a writ of certiorari because the Eleventh Circuit's broad holding will allow this Court to clarify whether, and to what degree, Rule 4(f)(3) service of process may contravene the laws of a foreign state. The various factual distinctions put forward by respondent, such as "diplomatic considerations" and OPEC's "special character," only further demonstrate that this is an appropriate case for certiorari. After all, this Court has never before provided guidance to lower courts regarding when it is appropriate to exercise their discretion to *not* grant service of process pursuant to Rule 4(f)(3), and the distinctions raised by OPEC would provide this Court an ideal opportunity to do so.

OPEC provides two further reasons why it regards this case as inappropriate for certiorari, neither of which is compelling. First, OPEC contends that "it was improper for Prewitt to wait deliberately until after the district court had already dismissed its case before raising the Rule 4(f)(3) issues through a Rule 59(e) motion." Opp. at 12-13 n.9. This argument is devoid of merit, since the district court *specifically* stated that its first opinion holding that OPEC could not be served under Rule 4(f)(2) was "without prejudice to the right of [Prewitt] to pursue an alternative means of effecting service on [OPEC]." Pet. App. 36a.

Second, respondent states that OPEC "is not an 'unincorporated association' capable of being served under any prong of Rule 4(f)." Opp. at 12-13 n.9. This argument also lacks merit. OPEC is not a sovereign, and even if it were, its activities would be amenable to suit in the United States under the commercial activities exception to the FSIA. *See* 28 U.S.C § 1605(a)(2). Nor is OPEC considered an international organization under U.S. law, since the United States does not participate in OPEC pursuant to a treaty or act of Congress. 22 U.S.C. § 288. Both of these conclusions were already reached in *Prewitt*, *see* 353 F.3d at 922 n.9, and would not be difficult for this Court to reach.

CONCLUSION

For the foregoing reasons, as well as those stated in the Petition for a Writ of Certiorari, certiorari should be granted.

Respectfully submitted,

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